SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 22, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Sweeny, Andrias, Gische, Gesmer, JJ.

5482 In re Alexis W., and Others,

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

Efrain V.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Bruce A. Young, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for respondent.

Andrew J. Baer, New York, attorney for the children Joaquin V., Laila V. and Jermiah V.

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

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Order of fact-finding and disposition (one paper), Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about March 11, 2016, which, to the extent appealed from as limited by the briefs, found, after a hearing, that respondent father had sexually abused his stepdaughter and derivatively abused and derivatively neglected his three biological children, unanimously affirmed, without costs.

A preponderance of the evidence supports the Family Court's finding that respondent sexually abused his stepdaughter (*see Matter of Karime R. [Robin P.]*, 147 AD3d 439, 440 [1st Dept 2017], citing Family Ct Act §§ 1012[e][iii]; 1046[b][i]). The stepdaughter's direct testimony regarding the incidents of sexual abuse included specific details and was sufficient to support the abuse finding (*see Matter of Markeith G. [Deon W.]*, 152 AD3d 424, 424 [1st Dept 2017]). The Family Court properly rejected the detective's testimony that the stepdaughter initially recanted the allegations, given that the detective questioned the child with her stepfather in the next room, in violation of interview protocols. Additionally, the detective interviewed the child without warning in her bedroom after waking her up in the middle of the night.

The Family Court properly precluded the testimony of respondent's expert witness regarding respondent's lack of pedophilic tendencies as not material and relevant to the proceedings (*see Matter of Isaiah F. [Alexander W.]*, 68 AD3d 627, 628 [1st Dept 2009]; *see also Matter of Aryeh-Levi K.*, 134 AD2d 428, 429 [2d Dept 1987]).

Respondent argues that the attorney for the stepdaughter was improperly permitted to ask leading questions when cross-examining her after she was called as petitioner agency's

witness. We reject this argument for three reasons. First, respondent fails to identify a single question by the attorney for the stepdaughter that he claims was leading. Moreover, respondent's counsel was offered the opportunity to resume cross-examination of the witness following her attorney's cross-examination, which he declined. Second, whether and to what degree to permit leading questions of a child witness in a sexual abuse case lies within the sound discretion of the trial court, considering "the complainant's age, and the intimate and embarrassing nature" of the alleged offenses (*People v Mendoza*, 49 AD3d 559, 561 [2d Dept 2008], *lv denied* 10 NY3d 937 [2008]; *see also People v Cuttler*, 270 AD2d 654, 655 [3d Dept 2000], *lv denied* 95 NY2d 795 [2000]). Respondent fails to identify any way in which the Family Court abused its discretion. Finally, to the extent that Family Court improperly permitted counsel to ask leading questions of her client, we find this to be harmless error, since the Family Court's determination was based on facts elicited from other testimony and evidence. Indeed, virtually all of the child's testimony in response to questions on cross-examination by her counsel was duplicative of her testimony on direct and in response to cross-examination by other attorneys, including respondent's.

The finding of derivative abuse and derivative neglect as to

the father's three biological children is supported by the record. Although there was evidence that respondent's biological children had positive interactions with him, at least one of the incidents of sexual abuse testified to by the stepdaughter occurred in the presence of one of respondent's biological children, and all of them occurred when his biological children were in the home and respondent was their sole caretaker. Respondent's youngest daughter is now the same age as his stepdaughter was when the abuse began. Accordingly, respondent's conduct demonstrated a fundamental defect in his understanding of the responsibilities of parenthood, and placed his biological children at imminent risk of abuse or neglect (*see Matter of Marino S.*, 100 NY2d 361, 373-374 [2003], *cert denied* 540 US 1059 [2003]; *Matter of Lesli R. [Luis R.]*, 138 AD3d 488, 489 [1st Dept 2016]; *Matter of Ashley M.V.* [Victor V.], 106 AD3d 659, 660 [1st Dept 2013]).

We have considered the father's remaining contentions, including his allegations of judicial misconduct during the fact-finding hearing, and find them unavailing.

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

ENTERED: MARCH 22, 2018

Margaret Sawal

DEPUTY CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5714-
5715

Index 652232/14
652522/13

The Madison Square Garden Company, et al.,
Plaintiffs-Appellants,

-against-

Harleysville Worcester Insurance Co.,
Defendant-Respondent.

- - - - -

The Madison Square Garden Company, et al.,
Plaintiffs-Appellants,

-against-

Harleysville Insurance Co. of New York,
Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order and judgment (one paper) of the Supreme Court, New York County (Anil C. Singh, J.), entered on or about May 18, 2016,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 7, 2018,

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

ENTERED: MARCH 22, 2018

Margaret Sowal

DEPUTY CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5921 Dorlus Day, Index 450614/15
Plaintiff-Appellant,

-against-

Summit Security Services Inc.,
Defendant-Respondent,

New York City Health and Hospitals Corporation, et al.,
Defendants.

_____

Brooklyn Legal Services, Brooklyn (Nicole Salk of counsel), for appellant.

Jackson Lewis P.C., Melville (David S. Greenhaus of counsel), for respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered September 20, 2016, which, to the extent appealed from, granted defendant Summit Security Services Inc.'s motion to dismiss the complaint as against it, unanimously affirmed, without costs.

Defendant New York City Health and Hospitals Corporation (HHC) had a security services contract with nonparty Paramount Security Services. Plaintiff was employed by Paramount as a security guard at two buildings housing HHC offices. When plaintiff suspected that Paramount was not paying him the prevailing wage, he voiced his concerns to his supervisor at HHC, and filed a prevailing wage complaint against Paramount with the

New York City Comptroller's Office. HHC subsequently transferred its security services contract from Paramount to defendant Summit Security Services Inc., and Summit became plaintiff's new employer. Plaintiff alleges that Summit improperly disciplined him for a series of minor infractions, and subsequently terminated his employment at HHC's request.

Plaintiff brought this action pursuant to Labor Law § 215 alleging that he was subjected to adverse employment action in retaliation for filing the wage complaint. In order to make out a claim for unlawful retaliation, a plaintiff must show, inter alia, that the employer was aware that the plaintiff had participated in a protected activity (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 528 [1st Dept 2013]). Here, as plaintiff concedes, the complaint in this action contains no facts to suggest that Summit, or any of its employees, had any knowledge of plaintiff's prior complaint about Paramount's failure to pay the prevailing wage. Plaintiff's attempt to establish knowledge based on an agency theory is unpersuasive. Accordingly, the complaint fails to state a cause of action for retaliation as against Summit (*see Romney v New York City Tr. Auth.*, 8 AD3d 254,

254-255 [2d Dept 2004] [dismissing retaliation claim because the required element of knowledge of the protected activity was lacking]).

In light of our disposition, we need not reach Summit's alternative ground for affirmance.

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

ENTERED: MARCH 22, 2018

Margaret Sowal
_____
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6051 The People of the State of New York Ind. 982/13
Respondent,

-against-

Duwayne Burton,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. and Mark Dwyer, J. at jury trial; Charles H. Solomon, J. at sentencing), rendered October 20, 2015, convicting defendant of murder in the second degree, burglary in the first degree and attempted robbery in the first degree, and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

The verdict was supported by legally sufficient evidence, and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 349 [2007]). Moreover, we find that the evidence was overwhelming. There is no basis for disturbing the jury's credibility determinations. The cell phone records and surveillance videotapes in evidence went far beyond placing defendant at the scene of the crime. Instead, they were so

harmonious with the accomplices' narrative that they exceeded the legal requirement of corroboration (*see People v Davis*, 28 NY3d 294, 303 [2016]; *People v Reome*, 15 NY3d 188, 191-195 [2010]), and provided compelling evidence of guilt when taken together with the accomplice testimony.

The court presiding over the initial portions of the trial, and the substitute justice presiding over the latter portions (when the first justice became unavailable), both properly denied defendant's application to impeach his own witness with a prior inconsistent statement. The witness's trial testimony did not tend to disprove or affirmatively damage the defense, but rather was only neutral or unhelpful (*see* CPL 60.35; *People v Fitzpatrick*, 40 NY2d 44, 51-52 [1976]). The witness's out-of-court statement and trial testimony were essentially similar, and both supported the defense theory, even if the prior version was more helpful. In any event, any error in excluding this impeachment was harmless, in light of the overwhelming evidence of guilt and the fact that the prior statement would only have been admissible for impeachment purposes and not as evidence in chief. Furthermore, we find that defendant was not deprived of his constitutional right to present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

The first trial court also properly allowed the People to

introduce the accomplices' statements to the police in order to rebut defendant's claim of recent fabrication. During trial, defendant attacked the accomplices' credibility by showing that their cooperation agreements motivated them to falsify their testimony. However, the prior consistent statements predated that particular motive to falsify (*see People v Flowers*, 83 AD3d 524 [1st Dept 2011], *lv denied* 17 NY3d 795 [2011], *cert denied* 565 US 1017 [2011]). To the extent defendant argues that they had a motive to fabricate because at the time they made the statement they were suspected of involvement in the crime, there is no requirement that, to be admissible, a prior consistent statement predate all possible motives to falsify (*see People v McClean*, 69 NY2d 426, 430 [1987]; *People v Baker*, 23 NY2d 307, 322-323 [1968]). Furthermore, any error here was also harmless.

With regard to defendant's remaining claims of evidentiary error and/or prosecutorial misconduct, we find nothing so egregious as to deprive defendant of a fair trial, and that any errors were likewise harmless.

Defendant's claim of ineffective assistance of counsel at sentencing is unreviewable on direct appeal, because it involves matters not fully explained by the record. Alternatively, on the existing record, to the extent it permits review, we find that

defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 22, 2018

Margaret Sowal
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6052 Oren Yerushalmy, Index 654016/16
Plaintiff-Appellant, 656096/16

-against-

Ofer Resles,
Defendant-Respondent.

- - - - -

Oren Yerushalmy,
Plaintiff-Appellant,

-against-

Ofer Resles,
Defendant-Respondent.

_____

Bryan Cave LLP, New York (N. Ari Weisbrot of counsel), for appellant.

Feuerstein Kulick LLP, New York (David Feuerstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 26, 2017 (Index No. 656096/16), which, to the extent appealed from, denied plaintiff's motion for summary judgment in lieu of complaint, unanimously affirmed, with costs.

The motion decided by the order on appeal seeks summary judgment converting Israeli judgments in plaintiff's favor against defendant into New York judgments (*see* CPLR 3213; 5303). The Israeli judgments are included among plaintiff's "claims, judgments and debts" against defendant that were settled in an agreement between the parties. The settlement agreement

provided, among other things, an option for plaintiff to market and sell a penthouse in which defendant had an interest. Plaintiff moved separately for summary judgment in lieu of complaint on the settlement agreement. The motion court denied both motions on the ground that defendant raised an issue of fact as to whether plaintiff properly exercised the option and therefore as to the rights he retained to enforce his claims (*see generally Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151, 155 [1975]). We find that since the Israeli judgments are included in the settlement agreement, and an issue of fact exists as to plaintiff's right under the agreement to enforce his claims, the motion court correctly denied the motion addressed to the judgments.

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

ENTERED: MARCH 22, 2018

Margaret Saval

DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6053 In re Mylah C.,

A Child Under Eighteen Years
of Age, etc.,

Chantal C.,
Respondent-Appellant,

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

_____

Larry S. Bachner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Dawne Mitchell, The Legal Aid Society, New York (Seymour W. James, Jr. of counsel), attorney for the child.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about April 4, 2017, which, to the extent appealed from as limited by the briefs, found that respondent mother neglected the subject child based on respondent's failure to comply with treatment for her mental illness, unanimously affirmed, without costs.

Petitioner demonstrated by a preponderance of the evidence that the mother suffers from mental illness and psychosis, that she often lacks insight into her illness and need for treatment, and that her mental condition interferes with her judgment and parenting abilities, thereby placing the child at imminent risk

of physical, mental or emotional impairment (see *Matter of Ruth Joanna O.O. [Melissa O.]*, 149 AD3d 32, 39 [1st Dept 2017], *affd* 30 NY3d 985 [2017]; *Matter of Jalicia G. [Jacqueline G.]*, 130 AD3d 402, 403 [1st Dept 2015]; *Matter of Immanuel C.-S [Debra C.]*, 104 AD3d 615 [1st Dept 2013]). The mother made numerous visits to the emergency department, exhibiting psychotic and aggressive behavior, homicidal ideation, somatic preoccupation, and poor judgment and insight, which on one occasion even caused her to be physically restrained. She also underwent multiple extended hospitalizations for mental illness (*Matter of Jacob L. [Chastity P.]*, 121 AD3d 502 [1st Dept 2014]), and experienced repeated relapses due to her noncompliance with prescribed medication and therapy (*Ruth Joanna O.O.*, 149 AD3d at 41; *Matter of Michael P. [Orthensia H.]*, 137 AD3d 499, 500 [1st Dept 2016]; *Matter of Naomi S. [Hadar S.]*, 87 AD3d 936 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]).

Evidence of actual injury to the child was not required to enter a finding of neglect, since there is sufficient evidence that the child was at imminent risk of harm due to the mother's untreated mental illness (*Ruth Joanna O.O.* at 41; *Matter of Immanuel C.-S [Debra C.]*, 104 AD3d at 615; *Matter of Annalize P. [Angie D.]*, 78 AD3d 413, 414 [1st Dept 2010]; Family Court Act §

1012 [f][i]; *see Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]). In any event, there is evidence that the mother's illness interferes with her ability to care and plan for the child.

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

ENTERED: MARCH 22, 2018

Margaret Saval
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6054 Sharlene Allen, Index 450327/16
Plaintiff-Respondent,

-against-

The Institute for Family Health,
et al.,
Defendants,

Ralph Dauito,
Defendant-Appellant.

_____

Savona, D'Erasmo & Hyer LLC, New York (Raymond M. D'Erasmo of counsel), for appellant.

Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, New York (D. Allen Zachary of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered December 7, 2016, which denied defendant Ralph Dauito's motion to dismiss the complaint as against him for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiff alleges that defendant Dauito, a radiologist, negligently read her sonogram, leading to a delay in the diagnosis and treatment of her breast cancer. Dr. Dauito avers that, at all relevant times, he was a New Jersey resident and worked only at an office in New Jersey. However, he acknowledges that he was licensed to practice medicine in New York and that he contracted with defendant Madison Avenue Radiology, P.C., a New York corporation, to provide radiology services to some of its

New York patients. Plaintiff's sonogram was performed in New York, Dr. Dauito relayed his diagnostic findings to Madison Avenue Radiology in New York, and Madison Avenue Radiology issued a report based on his findings that was allegedly relied upon by plaintiff and her doctors. Under these circumstances, New York courts may exercise jurisdiction over Dr. Dauito pursuant to CPLR 302(a)(1), notwithstanding his lack of physical presence in New York, because he transacted business with Madison Avenue Radiology and provided radiology services to patients in New York, including plaintiff, projecting himself into the State by electronically or telephonically transmitting his diagnostic findings (*see Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006]; *Parke-Bernet Galleries v Franklyn*, 26 NY2d 13, 16–17 [1970]).

New York courts may also exercise jurisdiction over Dr. Dauito pursuant to CPLR 302(a)(3), because, as alleged, Dr. Dauito's negligent misdiagnosis resulted in a delay in plaintiff's treatment, thereby causing injury to plaintiff in New York, and Dr. Dauito should reasonably expect his out-of-state negligent misdiagnosis in plaintiff's case to have consequences

in New York (*see Pomerantz v Wolfin*, 236 AD2d 379 [2d Dept 1997]; *see also Ingraham v Carroll*, 90 NY2d 592, 598 [1997]). Dr. Dauito does not dispute that the other requirements of CPLR 302(a)(3) are met.

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

ENTERED: MARCH 22, 2018

Margaret Saval
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6055 In re Gregory Huss, Index 450766/16
Petitioner-Appellant,

-against-

The Conference on Jewish Material Claims Against Germany,
Respondent-Respondent.

_____

Jacob Laufer, P.C., New York (Jacob Laufer of counsel), for appellant.

White & Case LLP, New York (Isaac S. Glassman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered April 28, 2017, dismissing the proceeding brought pursuant to CPLR article 78 to annul the determination of the arbiter, dated December 7, 2015, which affirmed respondent's decision suspending petitioner's Article 2 Fund benefits and demanding return of prior payments, unanimously affirmed, without costs.

The petition was properly dismissed because petitioner lacks standing to challenge the termination of his Holocaust reparations payments, as it was determined by the arbiter and affirmed by the Director of the German Ministry of Finance that he has no legal right to receive such payments (*see Hammerstein v Conference on Jewish Material Claims Against Germany*, 2008 NY

Slip Op 30935[U] [Sup Ct, NY County 2008]; *Revici v Conference of Jewish Material Claims Against Germany*, 11 Misc 2d 354 [Sup Ct, NY County 1958]; *Matter of Jewish Secondary Schools Movement v Conference of Jewish Material Claims Against Germany*, 11 Misc 2d 358, 358-359 [Sup Ct, NY County 1958]; *Sampson v Federal Republic of Germany*, 250 F3d 1145, 1156 [7th Cir 2001]).

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

ENTERED: MARCH 22, 2018

Margaret Saval
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6056 The People of the State of New York, Ind. 4695/14
Respondent,

-against-

Allen Goris,
Defendant-Appellant.

_____

The Demarco Law Firm, PLLC, Forest Hills (Enrico Demarco of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered September 15, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, and sentencing him to a term of four years, unanimously affirmed.

The court properly denied defendant's suppression motion. Under the particular circumstances present, the police were justified in conducting a limited protective sweep of defendant's apartment following his arrest on the ground floor of the building (*see Maryland v Buie*, 494 US 325 [1990]; *People v Febus*, 157 AD2d 380 [1st Dept 1990], *appeal dismissed* 77 NY2d 835 [1991]). The police saw defendant selling pills to another person just inside the building's entrance, and they previously observed numerous people being "buzzed in" to the building and

then emerging seconds later. Accordingly, the officers reasonably suspected that defendant was selling drugs out of his apartment. Having gone to the apartment at defendant's direction, after he was arrested, so that defendant's girlfriend could provide them with defendant's identification, the officers were reasonably concerned that the girlfriend, who knew of defendant's arrest, might destroy or dispose of evidence, and pose a danger to their safety. Therefore, they were entitled to enter the apartment to monitor her movements as she retrieved the identification. In doing so, the officers saw contraband in plain view, and then secured the apartment and obtained a warrant.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: MARCH 22, 2018

Margaret Sowah
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6057 VNB New York LLC, Index 651998/16
Plaintiff-Appellant,

-against-

Amnon Maidi, et al.,
Defendants-Respondents.

_____

Paykin Krieg & Adams LLP, Purchase (Charles D. Krieg of counsel), for appellant.

Zeichner Ellman & Krause LLP, New York (Bruce S. Goodman of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on December 28, 2016, which, inter alia, granted plaintiff's motion for summary judgment, unanimously affirmed, with costs.

Defendants Amnon Maidi and Simona Maidi concede both their liability as guarantors of the note which plaintiff seeks to enforce and their breach of the note's payment obligations. Defendants argue that plaintiff's express rights under the note to accelerate payment of the indebtedness upon a breach, and to collect attorney fees in an enforcement action, were extinguished by a 2012 so-ordered stipulation of settlement in a prior action to enforce, which provided, inter alia, that the prior action was discontinued with prejudice.

Defendants are judicially estopped from arguing that the

note is invalid, as they successfully moved for dismissal of a separate prior action brought in a foreign jurisdiction by claiming that the note was valid and its terms required that the action be brought in New York (*see D & L Holdings LLC v Goldman Co.*, 287 AD2d 65, 71 [1st Dept 2001], *lv denied* 97 NY2d 611 [2002]).

Alternatively, defendants' argument is unavailing. As defendants concede, the stipulation of settlement is a contract, and is construed under principles of contract law (*Hotel Cameron, Inc. v Purcell*, 35 AD3d 153, 155 [1st Dept 2006]). Nothing in the 2012 so-ordered stipulation of settlement indicates that the parties intended to extinguish their rights and obligations under the note. In light of the stipulation's provision that the prior enforcement action was discontinued with prejudice, the stipulation's entry precluded further action in that particular litigation (*see American Progressive Health Ins. Co. of N.Y. v Chartier,* 6 AD2d 579 [1st Dept 1958]), but had no effect on plaintiff's right to seek enforcement of the note upon defendant's subsequent breach.

Further, by its plain terms, the stipulation states that the principal amount of the note was due and owing, that defendants were guarantors of the note, and that plaintiff was entitled to full payment of the note's amount. Hence, contrary to

defendants' claim, the stipulation expressly recognizes the note's validity and the parties' rights and obligations thereunder. As the note expressly authorizes plaintiff to accelerate payments upon defendants' breach, and to collect attorney fees in an enforcement action, Supreme Court properly granted summary judgment.

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

ENTERED: MARCH 22, 2018

Margaret Sawal
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6058- Index 805354/15
6059 Arielle Weinberger Papadam, et al.,
Plaintiffs-Appellants,

-against-

Ivan K. Rothman, M.D., et al.,
Defendants-Respondents.

_____

Joseph C. Andruzzi, Bethpage, for appellants.

Reed Smith LLP, New York (Andrew B. Messite of counsel), for Ivan K. Rothman, M.D., respondent.

Keller, O'Reilly & Watson, P.C., Woodbury (Angela A. Cutone of counsel), for South Shore Hematology-Oncology Associates, P.C. and Leonard Kessler, M.D., respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered August 30, 2016, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about July 11, 2016, which granted defendants' motions to dismiss the complaint, and denied plaintiffs' cross motion for summary judgment on the first cause of action, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court providently exercised its discretion in deferring resolution of the first cause of action, which sought to remove defendant Dr. Ivan Rothman as the executor of the estate of his deceased wife, Deborah Rothman, and substitute

plaintiff Papadam, decedent's daughter, as the executor, to the then pending petition in the Surrogate's Court of Nassau County, which sought identical relief. The Surrogate's Court, which has concurrent jurisdiction in matters involving a decedent's estate (*see* NY Const, art VI, §§ 7, 12[d]; *Matter of Kaminester v Foldes*, 51 AD3d 528, 529 [1st Dept 2008]), administered the settlement of decedent's estate and retained jurisdiction over the proceedings (*see Reilly v Wygant*, 11 AD2d 647 [1st Dept 1960]; *Cipo v Van Blerkom*, 28 AD3d 602 [2d Dept 2006]).

Plaintiffs' causes of action for medical malpractice, wrongful death, and lack of informed consent, arising out of treatment rendered to their late mother, were properly dismissed for lack of standing, as plaintiffs are not authorized to act on behalf of the estate (*see* EPTL 5-4.1; *Carrick v Central Gen. Hosp.*, 51 NY2d 242, 251 [1980]).

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

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

ENTERED: MARCH 22, 2018

Margaret Saval
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6060 Steven M. D'Amico, Index 153463/16
Plaintiff-Appellant,

-against-

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

_____

Milman Labuda Law Group PLLC, Lake Success (Netanel Newberger of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered January 9, 2017, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the amended verified complaint for failure to state a claim, unanimously modified, on the law, to deny so much of the motion that seeks dismissal of plaintiff's claims for disability discrimination under the New York State and New York City Human Rights Laws (State and City HRLs), and otherwise affirmed, without costs.

Plaintiff sanitation worker suffered a hand injury on the job, and, on the basis of his doctors' recommendations, requested a reasonable accommodation of light duty. According to plaintiff, the light duty could have consisted of pairing him with another Department of Sanitation employee and permitting him

to drive a truck while the coworker did the heavy lifting. However, defendants responded by terminating him.

Liberally construing the facts alleged in the amended verified complaint and according that pleading the benefit of every possible favorable inference (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]), plaintiff has adequately pleaded claims for disability discrimination under a theory of failure to accommodate under the State and City HRLs (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014]). Notably, there is no indication that following plaintiff's request for light duty, defendants entered into an interactive dialogue with him in an attempt to reach some reasonable accommodation (*see Phillips v City of New York*, 66 AD3d 170, 176 [1st Dept 2009]).

The motion court properly held that plaintiff failed to allege that he engaged in any protected activity as a predicate for his retaliation claims. Neither plaintiff's request for a reasonable accommodation (*see Witchard v Montefiore Med. Ctr.*, 103 AD3d 596 [1st Dept 2013], *lv denied* 22 NY3d 854 [2013]; *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 [1st Dept 2010]) nor his filing of an internal workers' compensation claim constitutes

protected activities for purposes of the State and City HRLs (*see Brook* at 445; *Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008]).

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

ENTERED: MARCH 22, 2018

Margaret Soval

DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6061 The People of the State of New York, Respondent,

-against-

Charles Hamilton, Defendant-Appellant.

Ind. 3408/14

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at suppression hearing; Robert M. Stolz, J. at speedy trial motion and calendar call; Daniel P. Conviser, J. at jury trial and sentencing), rendered August 11, 2015, as amended, September 30, 2015, convicting defendant of burglary in the first degree (two counts), robbery in the first degree, robbery in the second degree (two counts) and assault in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Although defendant remained masked during the crime, there was a chain of compelling circumstantial evidence establishing his

identity.

Defendant's claim that the court should have reopened the suppression hearing to allow impeachment of an officer by way of the underlying facts of lawsuits against him is unpreserved and expressly waived, and the record does not establish that the court "expressly decided" this issue "in re[s]ponse to a protest by a party" (CPL 470.05[2]; *see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *People v Colon*, 46 AD3d 260, 263-264 [1st Dept 2007]). Although, when the issue of the lawsuits was first raised, the hearing court may have misunderstood the relief being sought, defendant expressly clarified that what he actually wanted was an opportunity to investigate the officer's police disciplinary history, and defendant reiterated this clarification at a calendar appearance before another justice. We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits as defendant failed to make a showing that cross-examination of the officer regarding the lawsuits would be relevant (*see People v Smith*, 27 NY3d 652, 662 [2016]). Thus, reopening the hearing would not have been warranted, even if such relief had been requested. We also note that defendant never attempted to make any use of the lawsuits at trial.

The court properly denied defendant's speedy trial motion.

Initially, we note that defendant received a suitable hearing on his motion. The 91-day period from November 5, 2014 to February 7, 2015 was excludable as a reasonable delay while the People were awaiting the results of DNA analysis being conducted by the Office of the Chief Medical Examiner. The People made a sufficient showing under *People v Clarke* (28 NY3d 48 [2016]) of their exercise of due diligence to obtain those results. Among other things, the record shows that the People promptly submitted the evidence for testing and kept the court informed of their efforts to follow up on their request. In light of this determination, defendant's remaining speedy trial claims are academic because the other periods of delay would not require dismissal of the indictment. In any event, we find the remaining claims unavailing.

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

ENTERED: MARCH 22, 2018

Margaret Sawal
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6062 In re Annalyn D.C.C.,
Petitioner-Respondent,

-against-

Timothy R., etc.,
Respondent-Appellant.

_____

Timothy R., appellant pro se.

Andrew J. Baer, New York, for respondent.

_____

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about July 19, 2017, which, inter alia, after a hearing, denied respondent father's motion for modification of a prior order of custody and visitation and granted petitioner mother's modification petition and directed that the father's visitation with the subject child be in New York State, unanimously affirmed, without costs.

The court properly found that the father failed to demonstrate a change in circumstances to warrant, among other things, allowing the parties' six-year-old child to travel as an unaccompanied minor to the United Kingdom for parental access time. To the extent the father argues that the mother's refusal to provide him with the child's green card was in violation of a prior custody and visitation order, there was no intentional violation in light of the mother's real concern that the father

would not return with the child to the United States. The connection between the father's failure to pay child support and denying visitation in the United Kingdom was one factor on which the court based its conclusion. The mother, on the other hand, demonstrated a sufficient change in circumstances, and the court properly ordered that the father's visitation with the child take place within the state of New York as in the child's best interest (*see Eschbach v Eschbach*, 56 NY2d 167, 171-172 [1982]; *see also Chirumbolo v Chirumbolo*, 75 AD2d 992, 993 [4th Dept 1980]).

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

ENTERED: MARCH 22, 2018

Margaret Saval
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6063-
6064 The People of the State of New York,
Respondent,

-against-

Ramon Lara,
Defendant-Appellant.

Ind. 2627/09

_____

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

Ramon Lara, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered July 10, 2012, as amended July 16, 2012, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 17 years to life, unanimously affirmed.

After considering the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), we conclude that the court properly denied defendant's constitutional speedy trial motion. Although there was substantial delay, it was satisfactorily explained, and relatively little of it was attributable to the People. Almost all of the delay is directly attributable to defendant, because he fled to the Dominican Republic shortly

after committing the murder. Had he not done so, or had he terminated his flight, the prosecution would not have been required to take any steps to extradite him (*see People v Diaz*, 81 AD3d 516 [1st Dept 2011], *lv denied* 17 NY3d 794 [2011]; *see also People v Ortiz*, 60 AD3d 563 [1st Dept 2009], *lv denied* 12 NY3d 919 [2009]). In any event, at the time of defendant's flight, while the United States had an extradition treaty with the Dominican Republic, that nation's law forbade any extradition of its own citizens, such as defendant. Accordingly, the police acted reasonably and in good faith by continuing to investigate defendant's whereabouts, but operating under the assumption that he could not be extradited. This conclusion is not undermined by the fact that Dominican extradition law changed somewhat during the period of delay at issue. Furthermore, defendant has not demonstrated that his ability to defend himself was prejudiced by the delay, and we find that the remaining *Taranovich* factors weigh against dismissal.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record, including attorney-client consultations and defense counsel's plea bargaining strategy (*see People v Harmon*, 50 AD3d 318, 318-319 [1st Dept 2008] *lv denied* 10 NY3d 935 [2008]). Accordingly, since defendant has not made a CPL 440.10

motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]), and that there was no violation of defendant's right to conflict-free representation. It appears that counsel originally intended to assert a justification defense, but advised the court, in the course of plea discussions where the court was not acting as a trier of fact, that he had advised his client to plead guilty because a justification defense would be unsuccessful. Defendant has not shown that counsel thereby created a conflict or impaired defendant's free choice to plead guilty.

We have considered and rejected defendant's pro se claim regarding his assertion of actual innocence.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 22, 2018

Margaret Soval

DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6065-
6066 &
M-589

Index 302521/13

M.M.,
Plaintiff-Respondent-Appellant,

-against-

D.M.,
Defendant-Appellant-Respondent.

_____

Friedman Kaplan Seiler & Adelman LLP, New York (Robert S. Smith of counsel), for appellant-respondent.

Dobrish Michaels Gross LLP, New York (Robert Z. Dobrish of counsel), for respondent-appellant.

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Judgment, Supreme Court, New York County (Louis Crespo, Special Referee), entered August 31, 2017, to the extent appealed from as limited by the briefs, awarding plaintiff wife child support and maintenance, awarding defendant husband a credit of $1 million for his separate property interest in the marital residence, distributing the parties' non-business marital assets 60% to plaintiff and 40% to defendant, awarding plaintiff a share of defendant's business interests valued as of January 2015, awarding credits for various post-commencement expenses, and allocating 65% of plaintiff's counsel fees to defendant, unanimously modified, on the law and the facts, to award defendant a credit of $71,000 for his Lehman Brothers retirement account, to delete the decretal language adjudging defendant

solely responsible for the children's private school tuition and direct instead that the parties share the children's private school tuition pro rata, to vacate the decretal language obligating defendant to contribute to the cost of a full-time nanny, and to remand for a determination of the credit owed defendant for documented moving expenses, documented post-commencement contributions to his 401(k) account and for a recalculation of defendant's child support obligation, and his child support arrears, treating plaintiff's durational maintenance as income, and otherwise affirmed, without costs. Appeals from order, same court and Justice, entered April 7, 2017, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff concedes that defendant's Lehman Brothers retirement account, valued at $71,000, is separate property and was erroneously distributed as a marital asset. Accordingly, defendant is entitled to a credit in that amount.

The Referee, who issued a 269-page decision determining the financial issues ancillary to the divorce after an 18-day trial, providently exercised his discretion in distributing the parties' non-business marital assets 60% to plaintiff and 40% to defendant. The decision shows that the Referee carefully considered the statutory factors in determining this disposition

of marital property, including plaintiff's contributions to defendant's career, at the expense of her own career, and the parties' probable future financial circumstances, in particular, defendant's far greater earning potential and family wealth (*see* Domestic Relations Law [DRL] § 236[B][5][d][9], [14]; *Murtha v Murtha*, 264 AD2d 552 [1st Dept 1999], *lv dismissed* 95 NY2d 791 [2000]).

Contrary to plaintiff's contention, the trial evidence demonstrates that the $1 million that defendant received from his father toward the down payment on the marital residence was a gift structured as a "loan" to defendant alone, and was therefore defendant's separate property (*see* DRL § 236[B][1][d][1]). There was no repayment using marital funds; indeed, there was no expectation of repayment.

In connection with determining plaintiff's share of defendant's business interests, the Referee providently exercised his discretion in choosing as a valuation date January 2015, a date between the commencement of the action and the trial (*see* DRL § 236[B][4][b]), on the ground that at around that time defendant was forcibly hospitalized and diagnosed with temporal lobe epilepsy, and subsequently had very little involvement in his family's business. We decline to disturb the Referee's determination on the ground that the value of the business

continued thereafter to rise "passively," i.e., through no efforts of defendant, since defendant had been actively involved in the business before he became ill (*see generally McSparron v McSparron*, 87 NY2d 275, 288 [1995]).

The Referee also providently exercised his discretion in using the pre-tax value of plaintiff's distributive share of defendant's business interests as an offset against an unrelated credit to defendant and adjusting plaintiff's share for taxes before distributing the remaining amount. The referee explained that the pre-tax value was used as an offset because defendant would retain possession of his business interests, while plaintiff's remaining distributive share was taxed because she would realize it as a tangible payment (*see Coburn v Coburn*, 300 AD2d 212, 213 [1st Dept 2002] ["The trial court has great flexibility in fashioning an equitable distribution of marital assets"]).

While the Referee found that defendant's post-commencement contributions to his 401(k) were separate property, on the record before us, it is not clear whether defendant was credited for his documented post-commencement contributions to that account. Accordingly, we remand the matter for a determination of the credit owed defendant for those contributions. Defendant's contention that a 5% average rate of return, stipulated to by the

parties, should be applied to the 401(k) from the date of the marriage is without merit, since the parties stipulated to the value of his separate property portion of the account as of June 30, 2015.

With respect to calculating defendant's child support obligation, the Referee providently exercised his discretion in imputing income of $1.5 million to defendant. In addition to the testimony of plaintiff's medical expert that the temporal lobe epilepsy with which defendant was diagnosed would not prevent defendant from resuming his role as president of the family business, the Referee based his conclusion that defendant was capable of high-level employment on his own observations of defendant during the trial. He found that defendant had presented a more competent version of himself to the neutral forensic expert during the parties' custody trial, when it was to his advantage to do so. Upon review of the record, we see no reason to disturb the Referee's credibility findings, which are entitled to great deference. We note that defendant's demonstrated earning history is an additional basis for upholding the Referee's determination (*see Matter of Culhane v Holt*, 28 AD3d 251, 252 [1st Dept 2006]; *Wesche v Wesche*, 77 AD3d 921, 923 [2d Dept 2010]).

The Referee also providently exercised his discretion in

raising the income cap to $650,000. He properly considered the lifestyle enjoyed by the children during the marriage, which included country club membership, theater and other entertainment, and luxury vacations (*see Culhane*, 28 AD3d at 252). Defendant failed to show any actual expenses in support of his contention that the child support award is higher than necessary to ensure that the children live an "appropriate lifestyle" (*id.*). However, we agree that the Referee "double counted" by imputing an additional $125,000 to defendant's income - representing his father's historical contribution to the children's private school tuition - and at the same time directing defendant to pay 100% of this add-on expense. Accordingly, we modify the order to direct that the parties share the cost of the children's private school tuition pro rata.

We also agree with defendant that the Referee erred in ordering him to contribute to the cost of a nanny, since plaintiff does not work, and the youngest child was 12 years old at the time of trial (*see* DRL § 240[1-b][c][4]).

We further agree with defendant that the Referee failed to credit defendant for his documented moving expenses.

Defendant's contention that $214,617 should have been imputed to plaintiff as income during the pendency of the action for the purposes of child support finds no support in the record.

However, defendant is correct that durational maintenance payments should be counted as income to plaintiff for the purposes of calculating child support (*see* DRL § 240[1-b][b][5][iii]). Accordingly, we remand for a recalculation of defendant's child support obligation and child support arrears, after including durational maintenance payments as income to plaintiff.

Plaintiff now seeks maintenance and child support arrears retroactive to service of the summons and complaint. She does not deny that she raises this issue for the first time on appeal, having previously requested that any arrears be calculated retroactive to the date of her pendente lite application. Before she made that application, defendant was paying unallocated support monthly; after he unilaterally reduced the amount, plaintiff sought court intervention. Since plaintiff does not claim that her needs and the children's needs were not being met by defendant's voluntary payments, we decline to make defendant's support obligations retroactive to the period in which he was making them (*see Matter of Tse v Van Der Ploeg*, 266 AD2d 8 [1st Dept 1999]).

The Referee providently exercised his discretion in awarding plaintiff maintenance for six months or until she received her distributive share of the marital assets, on the ground that the

cash flow from those assets would be sufficient to support her lifestyle without the need for additional maintenance from defendant. After a 15-year marriage in which she was primarily a homemaker, plaintiff surely would have been entitled to maintenance of a longer duration – if not for the equitable distribution to her of 60% of the non-business marital assets, which provided her with the means to be self-supporting. The Referee addressed at length the copious trial evidence of plaintiff's expenses, and carefully determined equitable distribution, child support, and maintenance in relation to one another so as to situate each party fairly with respect to the marital standard of living, and we see no basis for disturbing the determination as to the amount or duration of maintenance.

The Referee providently exercised his discretion in allocating 65% of plaintiff's counsel fees to defendant. The parties' accrued counsel fees exceeded $7,000,000, and were paid mostly out of their liquid marital assets, although defendant was earning a substantial salary until 2015. In view of the fact that plaintiff's access to funds is limited to her equitable distribution award, the Referee properly identified defendant as the "monied" spouse (*see* DRL § 237[a]; *O'Shea v O'Shea*, 93 NY2d 187, 190 [1999]). Further, the Referee properly took into account that, although both parties engaged in needless

litigation, plaintiff's trial positions were on the whole more successful (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]). We note that even after the award plaintiff remained responsible for more than $1 million in legal fees.

We have considered the parties' remaining arguments, including their contentions with respect to credits owed for various post-commencement expenses, and find them unavailing.

M-589 - *M.M. v D.M.*

Motion to change caption granted.

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

ENTERED: MARCH 22, 2018

Margaret Soval
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6067 Anthony Pereira, et al., Index 161864/13
Plaintiffs,

-against-

J.P. Morgan Chase Bank, N.A., et al.,
Defendants-Appellants,

All Counties Snow Removal Corp.,
Defendant-Respondent,

New York Plumbing-Heating-Cooling Corp.,
Defendant.

- - - - -

J.P. Morgan Chase Bank, N.A., et al.,
Third-Party Plaintiffs-Appellants,

All Counties Snow Removal Corp.,
Third Party Plaintiff-Respondent,

-against-

Rigged Rite, Inc.,
Third Party Defendant.

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White Fleischner & Fino, LLP, New York (Alisa Dultz of counsel), for appellants.

Westermann Sheehy Keenan Samaan & Aydelott, LLP, Uniondale (Michael F. McGowan of counsel), for respondent.

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Order, Supreme Court, New York County (Robert D. Kalish, J.) entered March 29, 2017, which, to the extent appealed from as limited by the briefs, denied defendants/third-party plaintiffs J.P. Morgan Chase Bank, N.A. and J.P. Morgan Chase & Co.'s (Chase) motion for summary judgment on their cross claim for

contractual indemnification against codefendant/third-party plaintiff All Counties Snow Removal, unanimously affirmed, without costs.

The motion court correctly determined that the language of the indemnification provision of these parties' contract was ambiguous. Therefore, Chase failed to establish its prima facie entitlement to summary judgment on the issue of contractual indemnification (*see e.g. Paz v Singer Co.*, 151 AD2d 234 [1st Dept 1989]).

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

ENTERED: MARCH 22, 2018

Margaret Soval

DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6068- Ind. 1917/16
6068A The People of the State of New York, 4106/16
Respondent,

-against-

Richard Henderson,
Defendant-Appellant.

_____

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

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

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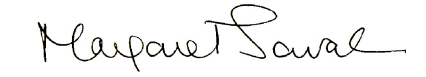
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered November 16, 2016, and from a judgment, same court (Gregory Carro, J.), rendered January 4, 2017,

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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: MARCH 22, 2018



DEPUTY CLERK

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

Tom, J.P., Webber, Oing, Moulton, JJ.

6069- Index 154374/12
6069A New York Center for Esthetic &
Laser Dentistry, et al.,
Plaintiffs-Appellants,

-against-

VSLP United LLC, et al.,
Defendants-Respondents.

_____

Morrison Tenenbaum PLLC, New York (Robert Kraselnik of counsel), for appellants.

The Law Firm of Hall & Hall, LLP, Staten Island (Thomas J. Hall of counsel), respondents.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered June 23, 2016, which granted defendants' motion for summary judgment dismissing plaintiffs' complaint seeking the return of a $72,500 down payment on the subject real property, and ordered that defendants are entitled to judgment in the amount of $101,000, plus interest, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 14, 2016, which declined to sign plaintiff's order to show cause seeking to reargue the June 23, 2016 order, unanimously dismissed, as taken from a nonappealable paper.

Plaintiff's appeal from the July 14, 2016 order must be dismissed as no appeal lies from an order declining to sign an order to show cause (*see Naval v American Arbitration Assn.*, 83

AD3d 423 [1st Dept 2011]; *Nova v Jerome Cluster 3, LLC*, 46 AD3d 292 [1st Dept 2007]). Nevertheless, as plaintiff did file a notice of appeal from the order entered June 23, 2016, and the substance of plaintiff's arguments relate to that order, this appeal is deemed to be an appeal from that order.

On the merits, the court properly determined that plaintiff had breached the contract for the purchase of certain real property by failing to seek a loan in the amount contemplated in the contingency clause of the contract. Instead plaintiff sought a loan in a greater amount, and having done so, breached the contract as a matter of law (*see Rice v Buie*, 259 AD2d 360 [1st Dept 1999]; *Post v Mengoni*, 198 AD2d 487 [2d Dept 1993]; *Silva v Celella*, 153 AD2d 847 [2d Dept 1989]). This is not a case where the transaction failed for reasons unrelated to plaintiff's loan application (*cf. Gorgoglione v Gillenson*, 47 AD3d 472, 474 [1st Dept 2008]; *Katz v Simon*, 216 AD2d 270 [2d Dept 1995]; *Markovitz v Kachian*, 28 AD3d 358 [1st Dept 2006]). Moreover, plaintiff never made a good faith effort to obtain the financing, as he never sought a loan in the amount contemplated in the contract.

Finally, in determining defendant's damages, the court properly held that such damages were the difference between the contract sale price and its fair market value at the time of the breach (*see White v Farrell*, 20 NY3d 487, 499 [2013]). The court

also properly used the price at which the property sold less than two months after plaintiff's breach as the fair market value, as plaintiff has offered no evidence to demonstrate any other fair market value (*see 12 Baker Hill Rd., Inc. v Miranti*, 130 AD3d 1425, 1427 [3d Dept 2015]; *Ryan v Corbett*, 52 AD3d 1270, 1271 [4th Dept 2008]).

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

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

ENTERED: MARCH 22, 2018

Margaret Sowal
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6070 The People of the State of New York, Ind. 1594/16
Respondent,

-against-

Elizabeth Alvarez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Meghan Callagee O'Brien of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered February 7, 2017,

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.

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

ENTERED: MARCH 22, 2018

Margaret Sarah
_____
DEPUTY CLERK

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

Tom, J.P., Webber, Oing, Moulton, JJ.

6071 The People of the State of New York, Respondent, Ind. 73/14

-against-

Herbert Corzantes, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered May 11, 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: MARCH 22, 2018

Margaret Sawal
DEPUTY CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6072N Madison Park Development Associates LLC,
Plaintiff-Respondent,

-against-

Judith Febbraro, et al.,
Defendants-Appellants,

John Doe #1 through 10,
Defendants.

Index 650613/14

_____

The Kurland Group, New York (Yetta G. Kurland of counsel), for appellants.

Silverman Shin & Byrne PLLC, New York (Donald F. Schneider of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered May 20, 2015, which denied defendants Judith Febbraro, Gerald Magpily and Ellen Ackrish's motion for attorneys' fees, unanimously affirmed, with costs.

Defendants sought the same relief of attorneys' fees in two separate motions, albeit on different grounds, making the second motion essentially one for renewal (*Sheehan v Carvalho*, 12 AD 430, 431-432 [1st Dept 1896]). In the second motion, defendants asserted "new facts" in the form of an indemnification provision. However, they failed to identify the second motion as a renewal motion, or to provide any explanation as to why they did not make the indemnification provision argument in the first motion. We

have previously held that Supreme Court lacks discretion to grant leave to renew "where the moving party omit[ted] a reasonable justification for failing to present the new facts on the original motion" (*Hernandez v Nwaishienyi*, 148 AD3d 684, 687 [1st Dept 2017], *lv dismissed in part and denied in part* 30 NY3d 1013 [2017]; *see also Matter of Beiny [Weinberg]*, 132 AD2d 190, 209-210 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]). For this reason, Supreme Court should have refused to grant defendants leave to make the motion.

Even if the court had considered the evidence offered by defendants, it is not "unmistakably clear" from the language of the indemnification provision that the parties intended that plaintiff would indemnify defendants for legal fees incurred in connection with this defamation, fraud, and tortious interference action (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). The defamation, fraud, and tortious interference claims against defendants did not "directly arise from" plaintiff's failure to complete the work, but rather from defendants' actions in their capacity as board members. Moreover, there is no evidence that the parties' intended this provision to be so broad

as to force plaintiff to indemnify defendants for tort claims brought by plaintiff against defendants.

We have considered the remaining arguments, and find them unavailing.

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

ENTERED: MARCH 22, 2018

Margaret Sawal
DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6073 The People of the State of New York, Respondent, Ind. 136/15

-against-

Danial Nelson, Defendant-Appellant.

_____

FisherBroyles, LLP, New York (Timothy Parlatore of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered June 10, 2016, convicting defendant, after a jury trial, of sexual abuse in the first degree and obstruction of breathing or blood circulation, and sentencing him to an aggregate term of four years, unanimously affirmed.

The prosecutor's disclosure, during jury deliberations, of several missing pages from the victim's emergency room treatment record does not require reversal because defendant has not demonstrated that there was "a reasonable possibility that the non-disclosure materially contributed to the result of the trial" (CPL 240.75; *see People v Martinez*, 22 NY3d 551, 566-567 [2014]). To the extent the missing pages could also be viewed as discoverable under *Brady v Maryland* (373 US 83 [1963]), there is likewise no reasonable possibility that the belated disclosure

contributed to the verdict (*see People v Vilardi*, 76 NY2d 67, 77 [1990]). Defendant was not prejudiced by his inability to cross-examine the victim about this material, because it had little or no impeachment value when viewed in the context of defendant's defense of consent and the issues actually litigated at trial. Furthermore, the deliberating jury was ultimately provided with a complete set of the emergency room records. Although the newly added pages were not highlighted for quick reference, the records as a whole were not voluminous, and the court told the jury that it was receiving a new set of records because the original set had been incomplete. In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]) in view of the overwhelming evidence refuting defendant's consent defense.

The court's *Sandoval* ruling, which permitted cross-examination of defendant about violent acts against a former girlfriend, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). These acts were highly probative of defendant's credibility, especially when viewed in light of defendant's direct testimony, and the questioning was not unduly prejudicial (*see People v Chebere*, 292 AD2d 323 [1st Dept 2002], 98 NY2d 673 [2002]).

The court providently exercised its discretion in admitting into evidence defendant's text messages from the night of the incident, because defendant's testimony opened the door to this evidence. Defendant's remaining challenges to the prosecutor's cross-examination and summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that to the extent there were any improprieties, they did not deprive defendant of a fair trial and do not warrant reversal in light of the overwhelming evidence.

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

ENTERED: MARCH 22, 2018

Margaret Sowah
DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6074 Cleven Jones, Index 150565/11
Plaintiff-Appellant,

-against-

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

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

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Asher & Associates, PC, New York (Jeffrey B. Manca of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Richard Dearing of counsel), for respondents.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about May 26, 2016, which granted the motion of defendants City of New York and New York City Department of Transportation (DOT) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants met their initial burden of showing that they lacked prior written notice of the subject pothole that caused plaintiff's accident by submitting an affidavit of a DOT record searcher regarding the results of the search she performed of the pertinent DOT electronic databases, and the corresponding paper records search she requested (*see Campisi v Bronx Water & Sewer Serv.*, 1 AD3d 166 [1st Dept 2003]). A citizen complaint, lodged

almost five months before plaintiff's accident, does not create a triable issue as to whether defendants had prior written notice of the defect, because the DOT highway repair person sent to the location found that the defect had been repaired (*see Worthman v City of New York*, 150 AD3d 553 [1st Dept 2017]; *Abott v City of New York*, 114 AD3d 515 [1st Dept 2014]).

Plaintiff presented no evidence regarding the condition of the asphalt immediately after the repair (*see Oboler v City of New York*, 8 NY3d 888, 889-890 [2007]; *Walker v City of New York*, 34 AD3d 226 [1st Dept 2006]). Even assuming that defendants failed to address the underlying cause of the pothole during their prior repair efforts, the record shows that the condition which caused the accident developed over time (*see Speach v Consolidated Edison Co. of N.Y., Inc.*, 52 AD3d 404 [1st Dept 2008]).

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

ENTERED: MARCH 22, 2018

Margaret Sowal

DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6075 In re Jayden A., and Another,

Children Under the Age of
Eighteen Years, etc.,

Elisaul A.,
Respondent-Appellant,

Nancy C.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy C. Park of counsel), for respondent.

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

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about August 29, 2016, which found that respondent father had neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). The evidence shows that the father knew or should have known about the mother's long-standing and serious mental health problems, and put the children at imminent risk of harm when he ignored the agency's directives and exposed the children to the

mother immediately following her release from the hospital (see *Matter of Toussaint E. [Angeline M.]*, 151 AD3d 417 [1st Dept 2017]). Even crediting the father's testimony, he left the children with the mother's adult daughter in the mother's home, where the mother could easily access them, despite the agency's directive not to leave the children with the mother's relatives. Furthermore, the record shows that the mother was spending time with the children since the agency caseworker overheard the children's voices while speaking with the mother on the telephone. The father's actions would have amounted to neglect even if they had not resulted in a violation of the court's temporary order of protection barring the mother from having contact with the children.

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

ENTERED: MARCH 22, 2018

Margaret Saval
DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6076 In re Granet & Associates, Inc., Index 654921/16
Petitioner-Appellant,

-against-

Thom Filicia, Inc.,
Respondent-Respondent.

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Tuttle Yick LLP, New York (David G. Skillman of counsel), for appellant.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City (Michael Wynn of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about March 15, 2017, which denied the application of petitioner Granet & Associates, Inc. to confirm the arbitration award and dismissed the petition, unanimously reversed, on the facts and law, with costs, to confirm the portion of the award awarding the stipulated amount, including the arbitrator's modification, and the matter remitted to the arbitrator for determination of whether respondent Thom Filicia, Inc. (TFI) may deduct related expenses from fees due to Granet for royalties received after March 7, 2016.

TFI did not seek to vacate or modify the award on a ground specified in CPLR 7511, and therefore, the court was obliged to confirm the award under CPLR 7510 (the court "*shall* confirm an award . . . unless the award is vacated or modified upon a ground

specified in section 7511")(emphasis added). Accordingly, the IAS court should have confirmed so much of the arbitration award that awarded payment of the stipulated amount (*see Matter of Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 3 [1st Dept 2009]).

The issue of whether TFI may deduct "related expenses" under the paragraph entitled "Confirmation" in the parties' licensing agreement is the subject of a new controversy arising from TFI's payments of fees to Granet from royalties that TFI received after March 7, 2016. Thus, the matter should be remitted to the arbitrator for a hearing and determination solely of that issue (*Matter of Board of Educ. of Amityville Union Free School Dist. v Amityville Teacher's Assn.*, 62 AD3d 992, 993 [2d Dept 2009]).

We have considered and rejected the parties' remaining arguments.

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

ENTERED: MARCH 22, 2018

Margaret Soval
DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6077 The People of the State of New York, Respondent, Ind. 2206/13

-against-

Malaquias Jimenez, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and White & Case LLP, New York (Martin Sawyer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Stephen J. Kress of counsel), for respondent.

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Judgment, Supreme Court, New York County (Larry R.C. Stephen, J. at suppression hearing; Patricia M. Nuñez, J. at jury trial and sentencing), rendered March 31, 2016, convicting defendant of robbery in the third degree and grand larceny in the fourth degree, and sentencing him to an aggregate term of 5 years' probation, unanimously affirmed.

Although the court suppressed defendant's initial statements as tainted by a warrantless arrest in violation of *Payton v New York* (445 US 573 [1981]), it properly found that defendant's subsequent video statement was attenuated from any illegality. The videotaped interrogation began about 3 hours and 45 minutes after the suppressed statements ended, and more than 15 hours after the arrest (*see e.g. People v Divine*, 21 AD3d 767, 767 [1st

Dept 2015], *affd* 6 NY3d 790 [2006]; *People v Santos*, 3 AD3d 317, 317 [1st Dept 2004], *lv denied* 2 NY3d 746 [2004]). The *Payton* violation was not flagrant, and a false statement by the police to defendant about the strength of the case also did not constitute flagrant misconduct (*see People v Johnson*, 52 AD3d 1286, 1287 [4th Dept 2008], *lv denied* 11 NY3d 738 [2008]; *People v Stokes*, 233 AD2d 194, 194 [1st Dept 1996], *lv denied* 89 NY2d 1101 [1997]). Moreover, the videotaped statement was made at a different location to a different interrogator, who did not refer to the prior interrogations, and defendant's first interrogator was merely present at the video statement without participating (*see People v Thompson*, 136 AD3d 429 [1st Dept 2016], *lv denied* 27 NY3d 1075 [2016]; *People v Chen Ren Jie*, 280 AD2d 301 [1st Dept 2001], *lv denied* 96 NY2d 798 [2001]). Another intervening circumstance was that defendant was served a meal (*see People v Fashaw*, 134 AD3d 490, 491 [1st Dept 2015], *lv denied* 27 NY3d 1131 [2016]). Furthermore, the overall circumstances were not coercive.

After a jury note revealed that one juror had conducted online research on false confessions and shared it with the rest of the jury, the court providently exercised its discretion in denying defendant's request to discharge the offending juror and concomitantly declare a mistrial. Defendant did not preserve his

contention that the court should have conducted one or more individual inquiries (*see People v Parilla*, 27 NY3d 400, 405 [2016]; *People v Albert*, 85 NY2d 851 [1995]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The court took adequate curative measures by thoroughly admonishing the jury to disregard the information obtained by a juror, not to conduct any outside research, and to decide the case solely based on the evidence presented at trial (*see People v Reader*, 142 AD3d 1109 [2d Dept 2016], *lv denied* 28 NY3d 1149 [2017]). The jury presumably followed these instructions (*see People v Davis*, 58 NY2d 1102, 1104 [1983]). The court also granted defense counsel's request for individual polling of the jurors as to whether they had reached the verdict based only on the evidence and the law as instructed by the court, and not based on any outside influence, to which all jurors answered in the affirmative. Under the

circumstances, the juror's misconduct in researching and telling the other jurors about false confessions did not prejudice defendant.

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

ENTERED: MARCH 22, 2018

Margaret Sowah
DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6078 Alysha Alston, et al., Index 306175/12
Plaintiffs-Appellants,

-against-

Allen Elliott,
Defendant-Respondent.

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Mitchell Dranow, Sea Cliff, for appellants.

The Lubowitz Law Firm, Scarsdale (Susan I. Lubowitz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about December 15, 2016, which granted defendant's motion for summary judgment dismissing the complaint based on plaintiffs' inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant met his prima facie burden by submitting the report of a physician who opined that plaintiff Alston's cervical spine sprain and plaintiff Brown's lumbar spine sprain had fully resolved (*see Cruz v Martinez*, 106 AD3d 482, 483 [1st Dept 2013]). The physician opined that, while Alston exhibited limitations in range of motion, the limitations were subjective and unsupported by any objective evidence of injury (*see Swift v New York Tr. Auth.*, 115 AD3d 507 [1st Dept 2014]). Moreover,

defendant argued that both plaintiffs' claims of serious injury were belied by their having ceased all treatment about seven years earlier, within three months of the accident, which they were required to explain (*see Pommells v Perez*, 4 NY3d 566, 572, 574 [2005]).

In opposition, plaintiffs submitted affidavits that contradicted their sworn deposition testimony concerning the reasons for their cessation of medical treatment. Plaintiff Alston testified that she terminated treatment after about three months because therapy wasn't "helping" her. Plaintiff Brown testified that he terminated treatment because it made him feel worse afterwards. However, in opposition to defendant's motion, in near identical affidavits, both plaintiffs asserted that they ceased treatment because no-fault benefits were discontinued, and they could no longer afford to pay "out of pocket." A party's affidavit that contradicts his prior sworn testimony "creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]; *see Cruz v Martinez*, 106 AD3d at 483).

The unexplained seven-year period gap in treatment also renders the opinion of plaintiff Alston's medical expert speculative as to the permanency, significance, and causation of

the claimed injuries (*see Cekic v Zapata*, 69 AD3d 464 [1st Dept 2010]). Plaintiff Brown did not offer any recent evidence of limitations, and therefore could not demonstrate that he sustained an injury involving "permanent consequential" limitation in use of a body part (*see Cabrera v Apple Provisions, Inc.*, 151 AD3d 594, 595 [1st Dept 2017]). Moreover, the evidence that both plaintiffs returned to work shortly after the accident and ceased treatment within three months, demonstrates that their injuries were minor in nature, involving neither "significant" nor "permanent consequential" limitations in use of their spines (*see Frias v Son Tien Liu*, 107 AD3d 589 [1st Dept 2013]; *Haniff v Khan*, 101 AD3d 643, 644 [1st Dept 2012]).

We have addressed plaintiffs' other contentions and find them to be without merit.

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

ENTERED: MARCH 22, 2018

Margaret Soval
DEPUTY CLERK

CORRECTED ORDER - APRIL 6, 2018

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6079-
6080 In re New York City Asbestos Litigation

Index 40000/88
782000/17

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All NYCAL Cases

- - - - -

Business Council of New York State; Lawsuit Reform Alliance of New York; New York Insurance Association, Inc.; Northeast Retail Lumber Association; Coalition for Litigation Justice, Inc.; Chamber of Commerce of the United States of America; National Association of Manufacturers; NFIB Small Business Legal Center; American Tort Reform Association; Washington Legal Foundation; and American Insurance Association,
Amici Curiae.

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K&L Gates LLP, New York (Tara L. Pehush of counsel), for Crane Co., appellant.

McDermott Will & Emery LLP, New York (Craig H. Zimmerman of counsel), for Honeywell International Inc., Amchem Products Inc., Union Carbide Corporation and Certainteed Corporation, appellants.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for Cleaver-Brooks, Inc., et al., appellants.

Michael J. Hutter, Albany, for Tishman Liquidation Corporation, appellant.

Zachary W. Carter, Corporation Counsel, New York (Scot C. Gleason of counsel), for the City of New York, **appellant**.

Belluck & Fox, L.L.P, New York (Seth A. Dymond of counsel), and Weitz & Luxenberg P.C., New York (**Alani** Golanski of counsel), for respondents.

Shook, Hardy & Bacon L.L.P., Washington, DC (Victor E. Schwartz of counsel), for amici curiae.

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Case management order, Supreme Court, New York County (Peter H. Moulton, J.), entered June 23, 2017, superseding all previous case management orders (CMOs) and amendments thereto in the New York City Asbestos Litigation (NYCAL), which modified the then existing CMO with respect to, inter alia, bankruptcy trust filings (section XXVI), the creation of an accelerated docket (sections XIV and XV), and the filing of punitive damages claims (section XXIV), unanimously affirmed, without costs.

We held in a prior appeal that the NYCAL Coordinating Justice has the authority under Uniform Rules for Trial Courts (22 NYCRR) § 202.69 to issue a CMO or modify an existing CMO, after consultation with counsel, that sets forth procedural protocols for the NYCAL that do not strictly conform with the CPLR so long as those protocols do not deprive a party of its right to due process (*see Matter of New York City Asbestos Litig.*, 130 AD3d 489 [1st Dept 2015]). Thus, in that appeal, we found that the court exceeded its authority in directing that applications for permission to charge the jury on the issue of punitive damages be made at the end of the evidentiary phase of the trial, and remanded the matter to the Coordinating Justice for a determination of procedural protocols that would not "leav[e] [defendants] guessing, until the close of evidence at trial, whether or not punitive damages will be sought" (*id.* at

490). We noted that our decision did not preclude the Coordinating Justice, after consultation with the parties, from reconsidering other aspects of the order on appeal, "including the determination whether to permit claims for punitive damages under the CMO, in the exercise of the court's discretion, either upon application or at its own instance" (*id.*).

The Coordinating Justice then agreed to "participate with the parties in a thoroughgoing reevaluation of the [CMO]" through a "negotiating committee" (*see Matter of New York City Asbestos Litig.*, 2015 WL 10889996, *1, *4 [Sup Ct, New York County 2015]), and, following an extensive process that did not reach consensus among the negotiating parties on all issues, the Coordinating Justice issued the CMO now on appeal.

The CMO, which retains many procedural provisions that have long been included in the preceding NYCAL CMOs, modified the then existing CMO by adding, among other things, provisions addressing the filing of asbestos claims with bankruptcy trusts, creating an "Accelerated Docket," and governing the filing of claims for punitive damages. Section XXVI, which sets deadlines for the submission of asbestos claims to bankruptcy trusts, contains new language requiring plaintiffs who intend to file claims with bankruptcy trusts to report to the court and defense counsel any post-deadline claims and to confer with the court before filing

such claims; as explained in the decision accompanying the CMO, this "will enable the [court] to monitor any behavior that could indicate that plaintiffs are seeking to hide such trust claims." Sections XIV and XV create rules for an "Accelerated Docket" in place of the prior rules for the "In Extremis Docket." Section XXIV and other provisions create rules for discovery and notice in connection with punitive damages claims so as to protect defendants' due process rights.

We find that these procedural protocols in the new CMO, as well as the other provisions challenged by defendants that were either present in preceding CMOs or appear for the first time in the new CMO, do not deprive defendants of their due process or other constitutional rights, even where they do not strictly conform to the CPLR, and that therefore the Coordinating Justice had the authority to issue these provisions absent defendants' consent.

We also decline to modify the CMO to reinstitute the deferral of claims for punitive damages.

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

ENTERED: MARCH 22, 2018

Margaret Saval
DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Singh, JJ.

6081 The People of the State of New York, Respondent, Ind. 4363/15

-against-

Steven Bekka,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered November 9, 2016, convicting defendant, after a jury trial, of assault in the second degree and obstructing governmental administration in the second degree, and sentencing him, as a second felony offender, to an aggregate term of six years, unanimously modified, as a matter of discretion in the interest of justice, to reduce the assault sentence to 4 years, and otherwise affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample evidence that defendant caused physical injury to a court officer. The officer's testimony supported the conclusion that he sustained substantial pain and impairment of physical condition that

persisted for two weeks (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]). To the extent that defendant challenges the credibility of the officer's description of his injuries, we find no basis for disturbing the jury's credibility determination.

Defendant did not preserve his challenges to the court's charge on physical injury, and to its response to a jury note on the same subject, and we decline to review them in the interest of justice. As an alternative holding, we find that the court sufficiently conveyed the applicable standards, and that its rereading of the initial charge was a meaningful response to the note. We have considered and rejected defendant's argument that his trial counsel rendered ineffective assistance by approving of the two instructions at issue.

We find the sentence excessive to the extent indicated.

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

ENTERED: MARCH 22, 2018

Margaret Sowal

DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6082 In re Tion Lavon J.,

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

Saadiasha J.,
Respondent-Appellant,

Good Shepherd Services,
Petitioner-Respondent.

_____

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

Geoffrey P. Berman, Larchmont, for respondent.

Dawne Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), attorney for the child.

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Order of fact-finding and disposition (one paper), Family Court, New York County (Sarah P. Cooper, J.), entered on or about April 21, 2017, which found that respondent mother permanently neglected the subject child, terminated her parental rights, and transferred custody and guardianship of the child to petitioner Good Shepherd Services and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence which demonstrates that the agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, referring the mother for

drug treatment programs and mental health services, as well as scheduling visitation with the child (*see Matter of Jaydein Celso M. [Diana E.]*, 146 AD3d 448 [1st Dept 2017]; *Matter of Essence T.W. [Destinee R.W.]*, 139 AD3d 403 [1st Dept 2016]).

Despite these efforts, however, the mother failed to plan for the child. The mother failed to provide the agency with accurate contact information (*see Matter of Jackie Ann W. [Leticia Ann W.]*, 154 AD3d 459 [1st Dept 2017]), and failed to comply with the requirements of her service plan (*see Matter of Sheila G.*, 61 NY2d 368, 373 [1984]; *Matter of Star Leslie W.*, 63 NY2d 136, 144 [1984]). The mother failed to engage in mental health services or a drug treatment program, failed to submit to random drug tests and continued to use illegal drugs, and failed to visit with the child consistently (*see Matter of Jaydein Celso M.*, 146 AD3d 448). The mother gained no insight into the reasons for the child's placement in foster care, nor benefitted from the minimal services with which she complied (*see Matter of Sydney A.B. [Felicia M.]*, 151 AD3d 533 [1st Dept 2017], *lv denied* 29 NY3d 917 [2017]).

The record supports the determination that termination is in the best interest of the child, and suspended judgment is unwarranted. The mother had engaged in scant services, and there was no indication the mother was able to care for the child or

would be in the future. The record suggested that the mother's issues appeared to have worsened, such that the court noted that it had no choice but to terminate her parental rights (*see Matter of Zhane A.F. [Andrea V.F.]*, 139 AD3d 458, 459 [1st Dept 2016], *lv denied* 27 NY3d 1187 [2016]).

A suspended judgment would serve only to prolong the child's lack of permanence, and would not have been in his best interest (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). The child's interests would best be served by freeing him for adoption by his maternal great aunt, who has met all of his needs and wishes to adopt him, and with whom he is stable and doing well and wishes to remain (*see Matter of Isiah Steven A. [Anne Elizabeth Pierre L.]*, 100 AD3d 559, 560 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]).

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

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

ENTERED: MARCH 22, 2018

Margaret Saval

DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6083 The People of the State of New York, Respondent, Ind. 1254/97

-against-

Ramon Hernandez, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

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Judgment, Supreme County, Bronx County (William C. Donnino, J. at suppression hearing; Denis J. Boyle, J. at plea and sentencing), rendered October 14, 1998, convicting defendant of three counts of criminal sale of a controlled substance in the third degree, and sentencing him to concurrent terms of 1½ to 4½ years, unanimously affirmed.

The court properly denied defendant's motion to suppress a showup identification by an undercover officer. Although 11 days had elapsed from the time of the drug sale until the undercover officer fortuitously recognized defendant on the street, the showup occurred five minutes after the officer's spontaneous identification. Accordingly, the showup was essentially confirmatory, and in any event could not have created a substantial likelihood of irreparable misidentification (*see e.g.*

People v McCray, 298 AD2d 203, 204 [1st Dept 2002], *lv denied* 99 NY2d 583 [2003]; *People v Hewitt*, 267 AD2d 326 [2d Dept 1999], *lv denied* 94 NY2d 903 [2000]).

We have considered and rejected defendant's argument that the undercover officer's testimony about the identification procedure was insufficient to satisfy the People's burden at the hearing.

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

ENTERED: MARCH 22, 2018

Margaret Sawal
DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6084 Mark Koplowitz, Index 301160/12
Plaintiff-Respondent,

-against-

Edwin King,
Defendant-Appellant.

_____

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellant.

Deutsch & Schneider, LLP, Glendale (Doris Barkhordar of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered September 8, 2016, which, insofar as appealable, denied defendant's motion to renew (1) plaintiff's motion for specific performance of a contract to sell real property and (2) defendant's motion to reargue plaintiff's motion, and to vacate the order granting plaintiff's motion, unanimously affirmed, without costs.

This appeal is not moot as plaintiff failed to move to dismiss on that ground in this Court, submitting certain documents as exhibits, rather than improperly mentioning those documents in his appellate brief (*see Chimarios v Duhl*, 152 AD2d 508, 509 [1st Dept 1989]).

The denial of reargument is not appealable (*see e.g. Corporan v Dennis*, 117 AD3d 601 [1st Dept 2014]). Hence, we will

address defendant's contentions with respect to renewal and vacatur only.

Plaintiff's failure to include his February 2012 letter when he moved for specific performance does not amount to "fraud, misrepresentation, or other misconduct" (CPLR 5015[a][3]) warranting vacatur. Contrary to defendant's claim, that letter does not show that he properly cancelled the parties' contract.

This is not a case that cries out for vacating an order in the interests of justice (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). Defendant was represented by counsel when he entered into the contract at issue in this case.

There is no basis for renewal of defendant's motion for reargument; defendant does not claim that the law changed between February 2016 and April 2016, when he moved for renewal (*see* CPLR 2221[d][2]; [e][2]).

As for renewal of plaintiff's motion for specific performance, the February 2012 letter is not new evidence (*see e.g. Matter of Weinberg*, 132 AD2d 190 at 214 [1st Dept 1987]). Even if we were to consider it, we would affirm the denial of the

motion, because the letter "would not have warranted a different result" (*CPA Mut. Ins. Co. of Am. Risk Retention Group v Weiss & Co.*, 80 AD3d 431, 432 [1st Dept 2011]; CPLR 2221[e][2]).

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

ENTERED: MARCH 22, 2018

Margaret Soval

DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6085 William Glazier, et al., Index 103482/10
Plaintiffs-Respondents-Appellants,

-against-

Lyndon Harris, et al.,
Defendants-Appellants-Respondents,

Robert A. Rimbo, et al.,
Defendants-Respondents.

_____

Satterlee Stephens LLP, New York (Michael H. Gibson of counsel), for appellant-respondents.

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for respondents-appellants.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for Robert A. Rimbo and the Metropolitan New York Synod-Evangelical Lutheran Church in America, respondents.

Lynch & Lynch, Garden City (Charlene I. Lund of counsel), for Mark S. Sisk and the Episcopal Diocese of New York, respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered June 20, 2016 which granted defendants Mark S. Sisk and Episcopal Diocese of New York's and defendants Robert Rimbo and Metropolitan New York Synod-Evangelical Lutheran Church in America's motions for summary judgment dismissing the complaint as against them, and denied defendants Lyndon Harris and St. John's Lutheran Church's motion for summary judgment dismissing

the complaint as against them, unanimously affirmed, without costs.

Plaintiffs allege that defendant Harris made defamatory statements about them at a retreat of members of defendant St. John's Lutheran Church council. Issues of fact exist as to whether Harris acted with constitutional malice, i.e., whether he made the statements knowing that they were false or recklessly disregarding whether they were false, so as to overcome the qualified privilege that undisputedly attaches to the statements (*see Present v Avon Prods.*, 253 AD2d 183, 188 [1st Dept 1999], *lv dismissed* 93 NY2d 1032 [1999]). There is evidence that casts doubt upon Harris's account of a meeting he had with a parishioner, which lies at the heart of the case against him. Harris claims that his statements at the retreat were limited to the (undisputed and non-defamatory) fact that plaintiffs had been named as beneficiaries of the parishioner's will. Affidavits by two attendees at the church council retreat say otherwise; the affiants say that Harris asserted that plaintiffs exercised undue influence over Jaffe and that they behaved immorally.

Plaintiffs failed to raise an issue of fact as to common-law malice since the record shows that Harris's statements were made, at least in part, to further the interest protected by the qualified privilege, i.e., the well-being of St. John's and

Harris's self-interest (*see Liberman v Gelstein*, 80 NY2d 429, 439 [1992]; *Stukuls v State of New York*, 42 NY2d 272, 279 [1977]). That Harris may also have harbored a degree of ill will toward plaintiffs is immaterial.

The record demonstrates conclusively that defendants Sisk and Episcopal Diocese of New York and Rimbo and Metropolitan New York Synod-Evangelical Lutheran Church in America cannot be held liable for Harris's alleged defamatory statements under the doctrine of respondeat superior because they did not exercise the requisite control over Harris (*see Abouzeid v Grgas*, 295 AD2d 376 [2d Dept 2002]). Contrary to plaintiffs' contention, there is nothing in the record that shows that, in engaging in the conduct at issue, Harris was acting with these defendants' involvement or approval (*cf. Cantrell v Forest City Publ. Co.*, 419 US 245 [1974] [editor who approved idea for magazine article could be held vicariously liable for damage caused by knowing falsehoods in the article]).

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

ENTERED: MARCH 22, 2018

Margaret Sawal
DEPUTY CLERK

Manzanet-Daniels, J.P., Kahn, Kern, Singh, JJ.

6086 The People of the State of New York, SCI 95/13
Respondent,

-against-

John Ramos,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen 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, Bronx County (Joseph J. Dawson, J. at plea; Raymond Bruce, J. at sentencing), rendered May 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.

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

ENTERED: MARCH 22, 2018

Margaret Soval
_____
DEPUTY CLERK

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

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6087 In re Victor Salvia, Index 102109/15
Petitioner-Respondent,

-against-

William Bratton, etc., et al.,
Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for appellants.

Chet Lukaszewski, P.C., Garden City (Chester Lukaszewski of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered December 28, 2016, granting the petition brought pursuant to CPLR article 78 to annul respondent Board of Trustees' determination, dated September 16, 2015, which denied petitioner accident disability retirement benefits, and directing the Board of Trustees to award petitioner such retirement benefits, unanimously affirmed, without costs.

Petitioner met his burden of establishing that he was entitled to accident disability retirement benefits by presenting the reports of the surgeon who performed his spinal surgery, the emergency room report indicating head injury and neck pain, and contemporaneous line-of-duty injury and follow-up physician reports indicating neck pain and cervical trauma (*see Matter of Doorley v Kelly*, 106 AD3d 554 [1st Dept 2013], *lv denied* 22 NY3d

858 [2014]). Although a decision by the Board of Trustees that a disability was not caused by a service-related accident will be upheld provided it is supported by "credible evidence" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 [1997]), the Board of Trustees' determination that petitioner's January 2008 accident was not causally related to his injury based on a two-year gap in treatment was conclusory. While the Medical Board "was free to come to any conclusion supported by medical evidence before it, the board could not disregard the only competent evidence on the issue before it" (*Matter of Belnavis v Board of Trustees of N.Y. City Fire Dept., Art. 1B Pension Sys.*, 84 AD2d 244, 248 [1st Dept 1982], *appeal dismissed* 56 NY2d 645 [1982]). Both the Medical Board and the Board of Trustees failed to refute the surgeon's documented opinion that the 2008 accident aggravated petitioner's degenerative disc condition, or offer an alternative trigger. They also failed to refute the surgeon's opinion that petitioner

had presented and been misdiagnosed with carpal tunnel syndrome, or address the Board of Trustees' own notes indicating that during the treatment gap, petitioner continued to take muscle relaxants and anti-inflammatories previously prescribed.

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

ENTERED: MARCH 22, 2018

Margaret Sawal
DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6088 Yvette Martinez, Index 300995/07
Plaintiff-Respondent,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Appellants,

"John Doe,"
Defendant.

_____

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

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered April 11, 2016, upon a jury verdict awarding plaintiff $300,000 for past pain and suffering, $1.5 million for future pain and suffering, $300,000 for future medical expenses, and $107,000 for past lost earnings, unanimously modified, on the law and the facts, to vacate the awards for past lost earnings, future medical expenses and future pain and suffering, and to remand the matter for a new trial of damages for future medical expenses and future pain and suffering, unless plaintiff stipulates, within 30 days after entry of this order, to reduce the awards for future medical expenses to $260,000 and future pain and suffering to $900,000, and to the entry of an amended

judgment in accordance therewith, and otherwise affirmed, without costs.

The verdict in plaintiff's favor is supported by sufficient evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498 [1978]). The jury could rationally have concluded that from her vantage point the bus driver could have seen the pothole in the street at the bus stop and that defendants' duty to stop the bus at a place where plaintiff could disembark safely was breached (*see Archer v New York City Tr. Auth.*, 25 AD3d 351, 352 [1st Dept 2006], citing *Malawer v New York City Tr. Auth.*, 18 AD3d 293 [1st Dept 2005], *affd* 6 NY3d 800 [2006]; *Engram v Manhattan & Bronx Surface Tr. Operating Auth.*, 190 AD2d 536 [1st Dept 1993]).

The verdict is also supported by the weight of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). The conflict between plaintiff's testimony that she stepped into a pothole while exiting the bus and the testimony of two witnesses that plaintiff slipped and fell as she attempted to step onto the curb merely presented an issue of credibility for the jury to resolve.

Plaintiff failed to establish her past lost earnings with reasonable certainty since her testimony was unsubstantiated by tax returns, W-2 forms, or other documentation (*Orellano v 29 E. 37th St. Realty Corp.*, 4 AD3d 247 [1st Dept 2004], *lv denied* 4

NY3d 702 [2004]; *cf. Kane v Coundorous*, 11 AD3d 304, 305 [1st Dept 2004] [plaintiff's testimony about lost earnings sufficient where defendants "expressly declined to challenge such testimony by the use of the W-2 forms in their possession"]).

The award for future medical expenses is excessive to the extent indicated (*see* CPLR 5501[c]; *see e.g. Togut v Riverbay Corp.*, 114 AD3d 535, 536 [1st Dept 2014]), as is the award for future pain and suffering (*see Rivera v New York City Tr. Auth.*, 92 AD3d 516 [1st Dept 2012]; *Alicea v City of New York*, 85 AD3d 585 [1st Dept 2011]; *Lowenstein v Normandy Group, LLC*, 51 AD3d 517, 518 [1st Dept 2008]).

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

ENTERED: MARCH 22, 2018

Margaret Sarah
DEPUTY CLERK

Manzanet-Daniels, J.P., Kahn, Kern, Singh, JJ.

6089 The People of the State of New York, Ind. 2438/14
Respondent,

-against-

Hasim Mitchell,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (David A. Slott 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, Bronx County (Steven L. Barrett, 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.

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

ENTERED: MARCH 22, 2018

Margaret Saval
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DEPUTY CLERK

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

Manzanet-Daniels, J.P., Kahn, Kern, Singh, JJ.

6091-
6092 The People of the State of New York,
Respondent,

-against-

Joseph Davis,
Defendant-Appellant.

Ind. 3201/11

_____

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

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J. at plea; Margaret L. Clancy, J. at sentencing), rendered November 25, 2013, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 22, 2018

Margaret Sawal
DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

6093N- Index 651014/17
6093NA REEC West 11th Street LLC,
Plaintiff-Appellant,

-against-

246 West 11th St. Realty Corp.,
Defendant-Respondent,

John Does 1-10, et al.,
Defendants.

_____

Fischer Porter & Thomas, P.C., New York (Arthur "Scott" L. Porter, Jr. of counsel), for appellant.

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

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Appeal from order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 1, 2017, which set a time of the essence closing for April 13, 2017 and denied plaintiff's motion for a preliminary injunction (i) voiding and vacating the parties' March 1, 2017 closing, and extending it to June 30, 2017, (ii) enjoining the release of the escrow funds to defendant, (iii) and enjoining defendants from preventing plaintiff's reasonable access to the property, and from an order, same court and Justice, entered June 14, 2017, which granted defendant's motion for an order directing that the escrow funds be released to it, vacating the notice of pendency, and directing plaintiff to make contractual "vacancy payments" to defendant

until the notice of pendency is cancelled, unanimously dismissed, without costs, as moot.

Following the perfection of these appeals, Supreme Court granted defendant's motion to dismiss the action (Sup Ct, NY County, November 3, 2017, Ramos, J., index No. 651014/17). Accordingly, in view of the foregoing, the consolidated appeal from these two interlocutory orders is moot (*see e.g. Hogue v Kenilworth Apts., Inc.*, 139 AD3d 529 [1st Dept 2016]).

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

ENTERED: MARCH 22, 2018

DEPUTY CLERK

Tom, J.P., Kapnick, Kern, Moulton, JJ.

5353 Allison Scollar, Index 155608/14
Plaintiff-Appellant,

-against-

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

_____

Marc E. Scollar, Staten Island, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered January 27, 2017, modified, on the law, to deny defendants' motion to dismiss the complaint as to plaintiff's first cause of action to the extent it seeks recovery under 42 USC § 1983 against defendants, to deny the motion as to plaintiff's sixth cause of action against defendant City of New York for negligent training and supervision, and to deny the motion to the extent that a cause of action is stated against defendant Regina DeBellis for intentional infliction of emotional distress, and otherwise affirmed, without costs.

Opinion by Moulton, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Barbara R. Kapnick
Cynthia S. Kern
Peter H. Moulton, JJ.

5353
Index 155608/14

_____x

Allison Scollar,
Plaintiff-Appellant,

-against-

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

Plaintiff appeals from an order of the Supreme Court, New York County (Margaret A. Chan, J.), entered January 27, 2017, which granted defendants' CPLR 3211(a)(7) motion to dismiss the complaint.

Marc E. Scollar, Staten Island, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West and Jane L. Gordon of counsel), for respondents.

MOULTON, J.

This dispute arises out of an acrimonious child custody battle between plaintiff, who is the child's adoptive mother and custodial parent, and her former partner Brook Altman, who is the child's birth mother and noncustodial parent. Regina DeBellis, a sergeant with the New York City Police Department (NYPD), allegedly took various tortious actions to aid Altman in her dispute with plaintiff.

Plaintiff sued DeBellis and the City of New York as a result of these tortious actions, and Supreme Court dismissed the entire complaint. We now modify to reinstate certain causes of action.

According to plaintiff, her first contact with DeBellis came when DeBellis called her cell phone on May 6, 2013.[1] According to plaintiff's 50-h hearing testimony, DeBellis told her that plaintiff's child was too sick to be transferred from Altman's home to plaintiff's home, and, further, that plaintiff was a neglectful mother. DeBellis also asserted that she "had called ACS and started an investigation." Plaintiff claims that the Administration for Children's Services investigated the report on May 7, 2013, and determined that same day that the child was not

[1]Unless otherwise stated, the facts recited herein are from the complaint, the notice of claim and/or the General Municipal Law § 50-h hearing (50-h hearing).

at imminent risk.

Despite ACS's determination, plaintiff claims that on May 8, 2013 or May 9, 2013, DeBellis and two officers knocked on plaintiff's door and stated that they did not need a warrant to enter because they were investigating a child at imminent risk.[2] Plaintiff let them in. The three interrogated plaintiff in her home - - first in her living room and then in her bedroom - - for approximately two hours. No ACS worker was present. At her 50-h hearing, plaintiff claimed that during the course of this interrogation DeBellis questioned plaintiff on her choice of camp for her child, commented that plaintiff should fire the child's therapist, whom Altman did not like, and referred to the child's court-appointed law guardian as plaintiff's "pawn." DeBellis also allegedly threatened to call the Family Court Judge presiding over the child custody case to let her know that she gave custody to the wrong parent. Plaintiff testified at her 50-h hearing that after the police interrogation concluded, DeBellis threatened plaintiff "that she was going to call ACS again."

On or about May 14, 2013, plaintiff alleges, DeBellis followed through on her threat to contact the Family Court Judge.

[2]The complaint and the notice of claim refer to the date of May 8, 2013 but the 50-h hearing refers to the date of May 9, 2013.

According to plaintiff, the Judge stated on the record on May 21, 2013 that DeBellis had inappropriately attempted to influence her decision. Plaintiff alleges that between May 14, 2013 and May 28, 2013, DeBellis also contacted the child's law guardian to claim that the child was at imminent risk.

On or about May 15, 2013, plaintiff alleges, DeBellis maliciously or recklessly made a second false complaint to ACS.[3] Then, on June 10, 2013 and July 16, 2013, officers allegedly acting under the direction of DeBellis (but not accompanied by DeBellis) questioned plaintiff again in her home, without securing a warrant and without a basis to believe that the child was at imminent risk.

Plaintiff asserts that all of the above caused her severe emotional distress and psychological damage. According to plaintiff, she complained to DeBellis's precinct commander and to the Department of Internal Affairs. Plaintiff also filed Civilian Complaint Reports on May 16, 2013, May 30, 2013 and June 12, 2013.[4]

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[3]Plaintiff asserts that ACS closed both complaints as unfounded.

[4]As no discovery has yet occurred, the relationship, if any, between DeBellis and Altman has not been established. The City characterizes DeBellis as "overzealous," while plaintiff suspects that DeBellis had a personal relationship with Altman.

Plaintiff's complaint alleges six causes of action: 1) violation of 42 USC §§ 1983 and 1985, 2) abuse of process, 3) malicious prosecution, 4) negligent infliction of emotional distress, 5) negligence and 6) negligent training and supervision.

The City moved to dismiss plaintiff's entire complaint under CPLR 3211(a)(7). Supreme Court granted the City's motion in its entirety.

Supreme Court held that the notice of claim did not allege the necessary elements for malicious prosecution and abuse of process. It also found that plaintiff failed to allege a claim under 42 USC § 1983 because plaintiff did not allege that she was subject to an unlawful search at her home or that the City had an official policy or custom that caused plaintiff to be denied a constitutional right. The Court dismissed the 42 USC § 1985 cause of action because plaintiff did not allege facts to indicate an agreement or conspiracy between DeBellis and any other person. Supreme Court held that the notice of claim was too vague to provide defendants with notice of a claim for negligent training and supervision. The Court further found that the complaint failed to state a claim for negligent infliction of emotional distress because the alleged conduct did not rise to the requisite level of outrageous behavior. Nor did the

complaint state a claim for general negligence (or negligent investigation), which Supreme Court held was not cognizable in the absence of facts supporting a special duty.

We now modify Supreme Court's decision. We find that the complaint states claims against against DeBellis for intentional infliction of emotional distress based on her alleged malicious or reckless false reporting to ACS and her campaign of harassment. The complaint also states a claim against both defendants under 42 USC § 1983, and against the City for negligent training and supervision.

In deciding this appeal, we must liberally construe the complaint, as amplified by plaintiff's notice of claim, the transcript of the 50-h hearing and other papers submitted by the parties on the motions (*see Jeudy v City of New York*, 142 AD3d 821, 821 [1st Dept 2016]; *Kaminsky v FSP Inc.*, 5 AD3d 251, 251-252 [1st Dept 2004]), presume the facts alleged in support of the complaint to be true, and afford plaintiff the benefit of every possible favorable inference (*see Anderson v Edmiston & Co., Inc.*, 131 AD3d 416, 417 [1st Dept 2015]). The fact that a cause of action is not expressly demoninated is not fatal if the factual allegations in the complaint fit within a cause of action (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Castellotti v Free*, 138 AD3d 198 [1st Dept 2016]).

While she does not denominate the claim in haec verba, plaintiff's allegations concerning DeBellis's behavior state a claim for intentional infliction of emotional distress.

Some of DeBellis's alleged actions concern abuse of child protection procedures, which are governed by the Social Services Law.[5] A civil action may be maintained based on the false reporting of child abuse and maltreatment (*see Selapack v Iroquois Cent. School Dist.*, 17 AD3d 1169 [4th Dept 2005] [action alleging intentional infliction of emotional distress and defamation]; *see also Biondo v Ossining Union Free School Dist.*, 66 AD3d 725 [2d Dept 2009] [action alleging defamation and negligent hiring and training]; *Scholz v Wright*, 57 AD3d 645 [2d Dept 2008] [action alleging negligence and defamation]; *Zornberg v North Shore Univ. Hosp.*, 29 AD3d 986 [2d Dept 2006] [action alleging defamation]).[6] The Social Services Law also provides

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[5]Any person may make a report to ACS if that person has reasonable cause to suspect that a child is an abused or maltreated child (Social Services Law § 414). Certain individuals and institutions are mandated by law to report such cases of suspected child abuse or maltreatment (Social Services Law § 413). Those mandatory reporters are entitled to immunity if the report was made in good faith (Social Services Law § 419).

[6]The Social Services Law recognizes the existence of a civil cause of action based on the false reporting of child abuse or maltreatment and discusses when the subject of an unfounded report may introduce the report into evidence in a civil action or proceeding (Social Services Law § 422[5][b][i]).

that the making of a false report is a class A misdemeanor in violation of Penal Law § 240.50(4), and requires ACS to refer suspected cases of false reporting to law enforcement or the District Attorney (Social Services Law § 422[14]).

Here, although not expressly pleaded, the factual allegations in the complaint fit within a cause of action against DeBellis for intentional infliction of emotional distress based on her alleged malicious or reckless false reporting to ACS and malicious campaign of harassment.[7]

The tort of intentional infliction of emotional distress consists of four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]).[8] The standard of outrageous conduct is "strict," "rigorous" and "difficult to satisfy" (*id.* at 122 [internal quotation marks and citation omitted]). However, that is not the case when there is

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[7]Plaintiff asserted claims for malicious prosecution and abuse of process in an apparent effort to properly denominate a cause of action, but these claims fail for the reasons discussed *infra*.

[8]The claim for intentional infliction of emotional harm is not available against governmental entities (*see Pezhman v City of New York*, 47 AD3d 493 [1st Dept 2008]).

a "deliberate and malicious campaign of harassment or intimidation" (*Nader v General Motors Corp.*, 25 NY2d 560, 569 [1970]; *see also 164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49 [1st Dept 2004], *lv dismissed* 2 NY3d 793 [2004] [restaurant owners stated a claim for intentional infliction of emotional distress based on a professor's false claim of food poisoning, which disrupted restaurants' businesses and resulted in health department inspections]). Additionally, the outrageous nature of the conduct can be established when it arises from the abuse of a position of power, as is alleged here (*see Vasarhelyi v New School for Social Research*, 230 AD2d 658 [1st Dept 1996] [cause of action for intentional infliction of emotional distress stated where school's president created a report criticizing school officials, which he falsely attributed to plaintiff, hired attorneys to subject plaintiff to lengthy interrogations and ultimately fired her]).

Here, assuming the truth of plaintiff's allegations, as we must on a motion to dismiss, we cannot say, as a matter of law, that DeBellis's actions did not rise to the requisite level of outrageous conduct. The facts alleged by plaintiff describe both (1) a deliberate and malicious campaign of harassment and intimidation and (2) an abuse of power.

Plaintiff has also stated a claim against defendants under

42 USC § 1983 for deprivation of plaintiff's constitutional rights, specifically, her right under the Fourth Amendment to be free from warrantless and unlawful entries into the home (*see* US Const Amend IV; 42 USC § 1983; *Bah v City of New York*, 2014 WL 1760063, *7, 2014 US Dist LEXIS 60856, *19 [SD NY, May 1, 2014, No. 13-Civ-6690(PKC)(KNF)]). We reject defendants' argument that plaintiff's complaint is devoid of any allegation that she was subject to a search in her home. At the very core of the Fourth Amendment is the right to retreat into one's own home and "there be free from unreasonable governmental intrusion" (*Silverman v United States*, 365 US 505, 511 [1961]). "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained" (*Kyllo v United States*, 533 US 27, 37 [2001]). Any unjustified physical invasion of the structure of the home, "by even a fraction of an inch" is too much (*Silverman*, 365 US at 512). A warrant is required for the officer who barely cracks open the front door and sees nothing but a rug because the entire home is "held safe from prying government eyes" (*Kyllo*, 533 US at 37). Thus, contrary to defendants' argument, the mere allegation that the police entered plaintiff's home on the illegitimate pretext that plaintiff's child was at imminent risk is sufficient to plead a Fourth Amendment violation.

The record shows that plaintiff reported DeBellis's actions to DeBellis's commander, to the Department of Internal Affairs and in three Civilian Complaint Reports. The child's attorney and the child's therapist pleaded with NYPD's domestic violence unit, in writing, for the home entries to cease on the ground that they were potentially harming the child's mental health.

Despite these allegations of repeated notice to DeBellis's superiors of her actions, there is no indication in the present record that any action was taken to restrain her. Accordingly, contrary to the City's arguments, plaintiff has stated a claim for holding the City liable under § 1983 on account of its gross negligence or deliberate indifference to DeBellis's unconstitutional actions (*see Manti v New York City Tr. Auth.*, 165 AD2d 373, 379-380 [1st Dept 1991] [complaint's allegation that New York City Transit Authority failed to supervise its bus unit sufficiently alleged the defendant's deliberate indifference to the plaintiffs' constitutional rights in violation of 42 USC § 1983]; *Pendleton v City of New York*, 44 AD3d 733 [2d Dept 2007]; *Poe v Leonard*, 282 F3d 123, 140 [2d Cir 2002]).

Contrary to Supreme Court's conclusion, plaintiff's sixth cause of action states a claim against the City for negligent supervision and retention of DeBellis (*see Gonzalez v City of New York*, 133 AD3d 65 [1st Dept 2015]). Under this theory, an

employer may be liable for the acts of an employee outside the scope of his or her employment (*id.*; *see also* Restatement [Second] of Agency § 213, Comment d; Restatement [Second] of Torts § 317). Contrary to the City's argument, the facts permit an inference that DeBellis was acting outside of the scope of her employment, and, as plaintiff argues, "had some personal axe to grind." The cause of action is also sufficiently asserted in the notice of claim. As the City acknowledges, plaintiff described the City's failure to restrain DeBellis after plaintiff lodged her complaints. While this description was in the factual recitation of the circumstances giving rise to her claims, as opposed to in the section identifying her causes of action, the City nevertheless received notice.

Supreme Court correctly found that because no criminal or civil proceeding or action was commenced against plaintiff, no cause of action for malicious prosecution was stated (*see Broughton v State of New York*, 37 NY2d 451 [1975], cert denied 423 US 929 [1975]).[9] Plaintiff unpersuasively argues that the potential for a neglect proceeding is enough because the crux of

[9]A claim for malicious prosecution may also lie when an administrative proceeding is commenced which contains sufficient attributes of a judicial proceeding (*see e.g. Manti*, 165 AD2d at 381; *Groat v Town Bd. of Town of Glenville*, 73 AD2d 426 [3d Dept 1980, appeal dismissed 50 NY2d 928 [1980]).

a malicious prosecution claim is malice. However, malice is merely one element of the cause of action. ACS did not commence a neglect proceeding because, according to plaintiff, the reports were unfounded.

Supreme Court also correctly found that plaintiff failed to state a cause of action for abuse of process because no process, criminal or civil, was issued (*see Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 403 [1975]).

Plaintiff has abandoned her claims for recovery under 42 USC § 1985, general negligence, and negligent infliction of emotional distress, by failing to address those claims in her brief (*see Hardwick v Auriemma*, 116 AD3d 465, 468 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]). Were we to consider these claims, we would find that they were correctly dismissed.

Accordingly the order of the Supreme Court, New York County (Margaret A. Chan, J.), entered January 27, 2017, which granted defendants' CPLR 3211(a)(7) motion to dismiss the complaint, should be modified, on the law, to deny the motion as to plaintiff's first cause of action to the extent it seeks recovery under 42 USC § 1983 against defendants, to deny the motion as to plaintiff's sixth cause of action against defendant City of New York for negligent training and supervision, and to deny the

motion to the extent that a cause of action is stated against defendant Regina DeBellis for intentional infliction of emotional distress, and otherwise affirmed, without costs.

All concur.

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

ENTERED: MARCH 22, 2018

DEPUTY CLERK