SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 28, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9510 In re Julianne Polito, Index 104919/11
Petitioner-Appellant,

-against-

The New York City Department
of Education, etc.,
Respondent-Respondent.

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Law Offices of Nicholas A. Penkovsky, P.C., Riverdale (Nicholas A. Penkovsky of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Carol E. Huff, J.), entered January 12, 2012, which, to the extent appealed from as limited by the briefs, denied the petition seeking to annul an arbitration award, and granted respondent's cross motion to dismiss the proceeding brought pursuant to Education Law § 3020-a and CPLR article 75, unanimously modified, on the law and the facts, to reduce the fine to $2,500, and otherwise affirmed, without costs.

Deference is given to the Hearing Officer's decision to

credit the testimony of the special education student, who was the alleged victim of petitioner's actions, and the testimony of the teacher's aide, who was present at the time of the actions (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2008]). Contrary to petitioner's contention, the testimony of these two witnesses was not inherently incredible or contradictory.

Any prejudice that petitioner incurred in not receiving the subject student's Individual Education Plan prior to his testimony was cured when she received it later in the hearing, and was given the opportunity to move to strike on the grounds of incompetence, as well as to call additional witnesses on the issue (*see Matter of Civil Serv. Empls. Assn. v Soper,* 84 AD2d 927, 928 [4th Dept 1981], *affd* 56 NY2d 639 [1982]). Moreover, the Hearing Officer's determination that the student was competent to testify should not be disturbed (*see People v Parks*, 41 NY2d 36, 46 [1976]).

In the exercise of our discretion, we conclude that the $7,500 fine imposed on petitioner for her improper remark to the special education student before the entire class, coupled with her tossing a book at him, shocks one's sense of fairness (*see generally Matter of Pell v Board of Educ. of Union Free School*

Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 233 [1974]), because petitioner's conduct involves a single incident. Petitioner's remark, though improper, was not of a highly inflammatory nature and her actions appear to constitute an isolated incident. The Hearing Officer also found that the book did not hit the student. Furthermore, several of the specifications against petitioner were withdrawn or dismissed.

The Hearing Officer properly declined to award petitioner attorney's fees pursuant to Education Law § 3020-a(4)(c), in light of the findings that there was some basis for the assertion of each of the specifications against petitioner.

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

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

ENTERED: MARCH 28, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8679N Cheickna Sylla, Index 303537/10
Plaintiff-Appellant,

-against-

Brickyard Inc., et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

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

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about October 31, 2011, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion insofar as it seeks to dismiss the claim of a significant limitation of use of a body organ, member, function or system or a permanent consequential limitation of use of a body function or system, and otherwise affirmed, without costs.

Defendants established prima facie that plaintiff did not sustain a serious injury to his cervical spine by submitting an orthopedic surgeon's affirmed report stating that the range of

motion limitations he found were not significant and that any cervical spine injury had resolved (*see Canelo v Genolg Tr., Inc.*, 82 AD3d 584 [1st Dept 2011]). However, plaintiff raised an issue of fact by submitting the affirmed reports of his treating orthopedic surgeon and a radiologist who opined that, based upon the MRIs and examinations, the bulging cervical disc was causing plaintiff continuing limitations in range of motion in multiple planes (*see Perl v Meher*, 18 NY3d 208 [2011]; *Williams v Perez*, 92 AD3d 528 [1st Dept 2012]). Insofar as the motion court dismissed this claim based on an unexplained gap in treatment, it improperly relied on an argument raised by defendants for the first time in their reply papers (*see Tadesse v Degnich*, 81 AD3d 570 [1st Dept 2011]).

Since plaintiff's evidence raised a triable issue as to whether the accident caused a serious injury to his cervical spine within the meaning of the statute, it is unnecessary to

address whether his proof with respect to other alleged injuries would have been sufficient to withstand defendants' motion for summary judgment (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]).

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

ENTERED: MARCH 28, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8914 Celestino Dos Santos, Index 105861/08
Plaintiff-Appellant,

-against-

Consolidated Edison of
New York, Inc.,
Defendant-Respondent.

_____

Calano & Culhane, LLP, New York (Thomas A. Culhane of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 13, 2011, which, to the extent appealed from, granted the motion by defendant Consolidated Edison of New York, Inc. for summary judgment dismissing plaintiff's Labor Law §240(1) cause of action and denied plaintiff's cross motion for partial summary judgment on the same claim, unanimously reversed, on the law, without costs, defendant's motion denied, and plaintiff's cross motion granted.

Plaintiff, a laborer, was injured when he fell into a steam manhole that was part of defendant's steam distribution system in lower Manhattan. Plaintiff was employed by nonparty Felix Associates LLC (Felix) when the accident occurred. At around the

time of the accident, New York City was beset by a nor'easter that threatened the metropolitan area with heavy rain, strong wind gusts and high tides. Due to the severity of the storm, defendant engaged Felix to supplement its effort in responding to vapor conditions[1] and pumping water out of flooded manholes.

On the evening of April 15, 2007, plaintiff and a co-worker were dispatched to respond to a heavy vapor condition at Broad Street, north of Water Street. A gust of wind caused plaintiff to stumble and fall into the manhole which his co-worker had uncovered. Plaintiff landed in a pool of boiling water that reached his chest. The boiling water was caused by torrential rain that flooded the manhole and contacted the steam main. In an accident investigation report, defendant acknowledged that "[s]evere weather conditions lead [sic] to a loss of hazard protection around the exposed manhole." Defendant's general manager for Steam Operations testified that such hazard protection would have consisted of a railing. In granting defendant's motion and denying plaintiff's cross motion, the motion court found plaintiff's work to be routine maintenance

[1]Defendant's Operation and Maintenance Manual defines a steam vapor condition as "[s]team vapor or heat resulting from a defect in the distribution system or from an outside water source coming into contact with distribution piping."

that involved a common problem. We reverse.

Labor Law §240(1) affords protection to workers engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Whether a particular activity constitutes a "repair" or routine maintenance must be decided on a case-by-case basis, depending on the context of the work (*see Prats v Port Auth. of N.Y. and N.J.*, 100 NY2d 878 [2003]). A factor to be taken into consideration is whether the work in question was occasioned by an isolated event as opposed to a recurring condition. For example in *Davidson v Ambrozewicz* (12 AD3d 902 [3rd Dept 2004]), the Court concluded, in part, that work performed by the employee of an extermination contractor constituted a repair because a bat infestation he was engaged to remedy constituted "an isolated event" (*id.* at 903).

The record here demonstrates that the work performed by plaintiff at the time of his injury was far from routine. The accident report describes the condition plaintiff was required to address as follows:

> "The Broad and Water Street Steam main was flooded from water infiltration due to extremely heavy rainfall. The location is equipped with a pumping station which is located directly west of this manhole, on the sidewalk. At the time of the incident the pump was inoperable due to an obstructed discharge pipe and electrical issues .... The inoperability of this pump

> is not considered a direct cause of the flooding condition. If the pump was operating, the rate of water entering the manhole would have exceeded the capacity of the pump. Once the vapor condition was detected during a system survey, the Felix crew was dispatched to pump out the manhole."

On these facts, we find that plaintiff was engaged in a repair contemplated by the statute insofar as he was called upon to address a flooding condition that exceeded the capacity of the pumping station.

The motion court correctly found that the manhole meets the definition of a structure as that term is used in the statute. A structure is "a production or piece of work artificially built up or composed of parts joined together in some definite manner" (*Smith v Shell Oil Co.*, 85 NY2d 1000, 1001-1002 [1995][citations omitted]). Moreover, it is undisputed that plaintiff and his co-worker had to expose the manhole in order to pump out the subterranean water. Therefore, the motion court correctly found

that plaintiff's injury resulted from an elevation-related hazard that Labor Law 240(1) is intended to obviate (*see e.g. Allen v City of Buffalo*, 161 AD2d 1134 [4th Dept 1990]).

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

ENTERED: MARCH 28, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9536- Index 603109/08
9537-
9537A Jeffrey Hoffman,
Plaintiff-Respondent,

-against-

Helm Capital Group, Inc.,
Defendant,

Russell Hoffman,
Non-Party Arrestee-Appellant.

- - - - -

Jeffrey Hoffman,
Plaintiff-Respondent,

-against-

Helm Capital Group, Inc.,
Defendant,

James Michael Lenihan,
Non-Party Warrantee/Arrestee-Appellant.

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Kevin O'Rourke Moore, Chappaqua, for Russell Hoffman, appellant.

James Michael Leniham, White Plains, appellant pro se.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for respondent.

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Order, Supreme Court, New York County (Ira Gammerman, JHO), entered April 24, 2012, which granted plaintiff's motion to hold nonparty Russell Hoffman in contempt to the extent of ordering him to be committed for four days for criminal contempt and to be

committed indefinitely for civil contempt, unless or until he purged himself of contempt by paying a fine of $500 and providing the records he was ordered to produce, unanimously reversed, on the law, without costs, to vacate the findings of contempt, and the matter remanded to a Justice of the Supreme Court to determine whether civil contempt should be imposed and, if not, the appropriate penalty to be imposed. Orders, same court and JHO, entered May 25 and 30, 2012, which granted plaintiff's motion to hold nonparty James Michael Lenihan in civil contempt and ordered the preparation of a warrant for his arrest, unanimously reversed, on the law and the facts, without costs, the order vacated, and the matter remanded to a Justice of the Supreme Court for further proceedings consistent herewith.

In this action to recover on a promissory note, the parties stipulated to assign the matter to JHO Ira Gammerman, "to exercise all the powers of a Justice of this Court, including the power to manage all pretrial aspects of the case, decide all motions, hear and determine non-jury cases."

On March 26, 2009, a judgment was entered in this action in favor of plaintiff, in the total amount of $539,612.24. Plaintiff's attempt to enforce the judgment included issuance of a subpoena on defendant and a restraining notice to defendant's

counsel, appellant Lenihan. During enforcement proceedings, JHO Gammerman directed appellant Hoffman, defendant's president, to provide, inter alia, defendant's complete books and records, including copies of issued checks. Upon learning that Lenihan had issued checks from his attorney trust accounts in order to pay some of defendant's obligations, JHO Gammerman ordered that Lenihan, inter alia, produce copies of those checks. Upon appellants' failure to comply with JHO Gammerman's orders, plaintiff moved by orders to show cause for contempt, and JHO Gammerman found Russell in civil and criminal contempt and Lenihan in civil contempt.

While CPLR 4311 and 4317(a) give a referee, upon consent of the parties, the power to hear and determine all trial issues before the court, CPLR 4301 specifically precludes a referee and, thus, a JHO from "adjudg[ing] any person except a witness before him guilty of contempt." While Judge Gammerman had the power to make factual findings concerning violation of his orders, he was without power to adjudge persons in contempt because neither contempt finding involved behavior occurring before him (see *Greco v Rodriguez*, 80 AD3d 562 (2d Dept 2011). Thus, those adjudications must be vacated. Moreover, the criminal contempt finding must also be vacated given the absence of personal

service of notice that criminal contempt was being sought (*Matter of Murray*, 98 AD2d 93, 98 [1st Dept 1983]). Although he did have the power to make findings as to whether his orders had been violated, Judge Gammerman's failure to make findings that Lenihan's actions defeated, impaired, impeded or prejudiced a right or remedy of a party warrants a further hearing (see *Matter of Ross v Sherwood Diversified Servs.*, 88 AD2d 936 [2d Dept 1982]; Judiciary Law § 753[A]).

Accordingly, the contempt orders against Hoffman and Lenihan are vacated and the matters are remanded to a Justice of the Supreme Court to evaluate findings and determine the appropriate penalty for Hoffman and for a new hearing as to Lenihan.

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

ENTERED: MARCH 28, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9567 Janie Gaines, Index 14471/03
Plaintiff-Respondent,

-against-

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

The New York City Department
of Social Services,
Claimant-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (William K. Chang of counsel), for appellant.

Finkelstein & Partners, LLP, Newburgh (James W. Shuttleworth, III of counsel), for respondent.

Tamara L. Stack, New York, for Estate of Janie Gaines, respondent.

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Order, Supreme Court, Bronx County (Howard Sherman, J.) entered October 20, 2011, which denied a motion by nonparty the New York City Department of Social Services for an order amending a prior order (same court, Edgar G. Walker, J.), entered August 17, 2010, authorizing the creation of a supplemental needs trust, unanimously reversed, on the law, without costs, and the latter order vacated.

Plaintiff died eight months before the instant motion was made. "The death of a party divests a court of jurisdiction to

conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015(a)" (*Faraone v Natl. Academy of Tel. Arts & Sciences*, 296 AD2d 349, 350 [1st Dept 2002] [internal quotation marks omitted]). The foregoing is without prejudice to any proceedings that may be taken once an estate representative has been duly substituted.

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

ENTERED: MARCH 28, 2013

CLERK

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

9645 The People of the State of New York, Dkt. 9980C/05
Appellant,

-against-

Yudelka Acevedo,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Robert A. Sackett, J.), entered on or about September 7, 2011, which granted defendant's CPL 440.10 motion to vacate a judgment of conviction, unanimously reversed, on the law, the conviction reinstated, and the matter remanded for further proceedings on the motion.

Although defendant's CPL 440.10 motion was made on the ground of ineffective assistance of counsel, the court granted the motion solely on the basis of its sua sponte finding that the minutes of defendant's 2005 plea to falsifying business records in the second degree reflected an insufficient allocution. Since defendant did not appeal from her conviction, and since the defect in the plea allocution is an issue that appears on the record, collateral review of the sufficiency of the allocution is

barred by CPL 440.10(2)(c). In *People v Cuadrado* (9 NY3d 362, 365 [2007]), the Court of Appeals expressly declined to create an exception for "fundamental" or "jurisdictional" defects, and defendant's arguments for collateral review in this regard are unavailing.

We remand for consideration of defendant's ineffective assistance claim, which the motion court did not reach.

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

ENTERED: MARCH 28, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

9646 In re Emanuel G.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 21, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree (two counts), sexual abuse in the first degree (two counts), sexual misconduct and sexual abuse in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously modified, on the law, to the extent of vacating the findings as to sexual misconduct and sexual abuse in the third degree and dismissing those counts of the petition, and otherwise affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. While the victim may have used childlike language to describe matters of anatomy, the totality of his testimony warrants the inference that appellant engaged in anal sexual conduct (Penal Law § 130.00[2][b]). As for the sexual abuse counts, the evidence warrants the inference that appellant acted for the purpose of sexual gratification.

Appellant did not preserve his arguments that the court erred in admitting certain medical records and that counsel for the presentment agency engaged in misconduct in cross-examination of appellant and in summation, and we decline to reach these claims in the interest of justice. As an alternative holding, we find that any errors were harmless, particularly in the context of a nonjury trial (*see People v Moreno*, 70 NY2d 403, 406 [1987]).

As the presentment agency concedes, the sexual misconduct and third-degree sexual abuse findings should be dismissed as lesser included offenses.

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

ENTERED: MARCH 28, 2013

CLERK

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

9647 Kyong Jae Lee, et al., Index 301545/08
Plaintiffs-Appellants-Respondents,

-against-

Lancer Insurance Company,
Defendant-Respondent-Appellant,

M&R Marcus Co., et al.,
Defendants.

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Francis M. DeCaro, Bronx, for appellants-respondents.

Law Offices of Curtis, Vasile P.C., Merrick (Patricia M. D'Antone of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 6, 2011, which, to the extent appealed from as limited by the briefs, granted the branch of plaintiffs' cross motion for summary judgment that sought reformation of an insurance policy with defendant Lancer Insurance Company, denied the branch of plaintiffs' cross motion that sought a declaration in its favor, and granted defendant Lancer's cross motion for summary judgment, unanimously modified, on the law, to deny the branch of plaintiffs' cross motion that sought reformation of the policy, and to declare that defendant Lancer is not obligated to defend or indemnify plaintiffs in the underlying personal injury action, and otherwise affirmed, without costs.

Supreme Court should not have reformed the policy issued by Lancer so as to list plaintiffs as the insureds. Every application for insurance submitted to Lancer listed Jay Family Parking, Inc. as the only applicant; plaintiffs were never personally listed as applicants. While plaintiffs correctly contend that reformation is warranted where an insurance applicant "misdescribe[s]" the identity of an owner as "a result of an innocent mistake" (*Anand v GA Ins. Co. of N.Y.*, 228 AD2d 397 [2d Dept 1996]), ownership is not the only issue here. Indeed, Lancer submitted an affidavit from its vice president and associate general counsel stating that Lancer would not have issued the policy if it had known that plaintiffs owned the premises in their personal capacities, and that it did not intend to cover the risk for which plaintiffs now seek coverage (*cf. Crivella v Transit Cas. Co.*, 116 AD2d 1007, 1008 [4th Dept 1986]; *Court Tobacco Stores v Great E. Ins. Co.*, 43 AD2d 561 [2d Dept 1973]).

Supreme Court, however, correctly found that Lancer's declination of coverage was proper on the ground that the personal injury accident for which plaintiffs seek coverage was not within the scope of the policy. The policy provides coverage for Jay Family Parking's "garage operations," which is defined

as, among other things, "all operations necessary or incidental to a garage business." Here, it is undisputed that plaintiffs owned the premises in their personal capacity, that Jay Family Parking did not conduct business at that premises, and that plaintiffs, in their personal capacities, leased the premises for the use of a poultry store and a used car dealer. Neither of these uses are in accordance with the garage non-dealer policy issued by Lancer.

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

ENTERED: MARCH 28, 2013

CLERK

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

9651 Southern Wine & Spirits of America, Inc., et al., Plaintiffs-Respondents-Appellants, Index 650083/10

-against-

Impact Environmental Engineering, PLLC, et al., Defendants-Appellants-Respondents.

_____

DL Rothberg & Associates, PC, Ardsley (Debra L. Rothberg of counsel), for appellants-respondents.

Ganfer & Shore, LLP, New York (Ira Brad Matetsky of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 13, 2012, which denied that branch of defendants' motion for summary judgment that sought dismissal of plaintiffs' claims for negligence and gross negligence, granted that branch of the motion that sought dismissal of Southern Wine & Spirits of New York, Inc. (Southern New York) and Syosset Property Partners, LLC, as plaintiffs in this action, and granted that branch of the motion that sought dismissal of the complaint as against defendants, except Impact Environmental Consulting, Inc. (Impact), unanimously affirmed, with costs.

In a prior appeal in this action, we held that plaintiffs could not utilize the relation-back provisions in CPLR 203(f) to

cure their defective initial complaint, based on their failure to comply with the subject agreements' condition precedent to commencing an action against Impact, since the doctrine is dependent upon the existence of a valid preexisting action (*see Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 80 AD3d 505 [1st Dept 2011]). However, on this appeal, we find that the savings clause of CPLR 205(a) does not bar plaintiffs' action, since the statute was "created to serve in those cases in which the prior action was defective and so had to be dismissed" (*see Carrick v Central Gen. Hosp.*, 51 NY2d 242, 248-249 [1980]). The dismissal of the prior action for plaintiffs' failure to comply with a condition precedent was not a judgment on the merits (*see Sabbatini v Galati*, 43 AD3d 1136, 1139 [2d Dept 2007]), and plaintiff commenced a new action within the six-month period required by CPLR 205(a).

The negligence claim is timely, since plaintiffs filed the original complaint on December 11, 2008, less than three years after Impact's submission of the last environmental site assessment (ESA) report to plaintiff Southern Wine & Spirits of America, Inc. (Southern Wine). Indeed, the three-year statute of limitations on the professional negligence/malpractice claim did not begin to run until Impact delivered its last report to

Southern Wine (*see* CPLR 214[6]; *Levin v PricewaterhouseCoopers*, 302 AD2d 287, 288 [1st Dept 2003]).

Public policy "forbids a party's attempt to escape liability, through a contractual clause, for damages occasioned by grossly negligent conduct" (*Colnaghi, U.S.A. v Jewelers Professional Servs.*, 81 NY2d 821, 823 [1993] [internal quotation marks omitted]). The court properly declined to enforce Impact's contractual limitation on liability, since an issue of fact exists as to whether Impact's conduct was "grossly negligent," given plaintiffs' expert affidavit stating that Impact failed to disclose to Southern Wine the presence of 38 drywells, containing potential contaminants, on plaintiffs' property, despite the availability of this information in the public records.

The court properly found that Impact had a professional duty independent of the parties' agreements. Although Impact, an environmental consultant, was not subject to licensing requirements, public policy requires that it should be held to a "professional" standard of care, given the nature of its services (*see Green Hills (USA), L.L.C. v Aaron Streit, Inc.*, 361 F Supp 2d 81, 89-91 [ED NY 2005]). Indeed, "[p]rofessionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties"

(*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]).

The court properly dismissed Southern New York and Syosset Property as plaintiffs in this action. Absent privity of contract, or the functional equivalent of privity of contract, these entities have no right to recover from defendants either for breach of contract or professional negligence (*see Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636, 637 [1st Dept 1993]). There is no indication in the record that Southern New York and Syosset Property were intended beneficiaries of Southern Wine's agreements with Impact. Indeed, there is no evidence that Impact was aware that the substance of the ESA Reports it furnished to Southern Wine would be transmitted to and relied upon by any other entity, including Southern New York and Syosset Property (*Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551, 553 [1985]). Nor is there any evidence of direct contact or any communication between Impact and the two entities that would constitute conduct linking Impact to either of the entities to support their reliance on the ESA Reports (*id.* at 553-554; *cf. Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 425 [1989]). Further, the parties' agreements contained a clause in which Impact disclaimed any intention to

benefit third parties, and there is no evidence of any provisions in the parties' agreements granting enforceable rights to any entity other than Impact (*cf. Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp*, 82 AD3d 421 [1st Dept 2011]).

Given that Southern Wine was not in privity with any of the other defendants, except Impact, the court properly dismissed plaintiffs' complaint as against the other defendants (*see Leonard v Gateway II, LLC*, 68 AD3d 408, 408-409 [1st Dept 2009]).

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

ENTERED: MARCH 28, 2013

CLERK

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

9652 In re Immanuel C.-S.,

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

Debra C.,
Respondent-Appellant,

Commissioner of the Administration
for Children's Services,
Petitioner-Respondent.

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Patricia W. Jellen, Eastchester, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

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

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Order, Family Court, New York County (Jody Adams, J.), entered on or about March 28, 2012, which, after a fact-finding hearing, determined that appellant mother had neglected the subject child, unanimously affirmed, without costs.

The court properly determined that petitioner proved by a preponderance of the evidence that the mother had neglected the child by reason of her untreated mental condition and failure to provide adequate supervision and guardianship, which placed the child at imminent risk of becoming impaired (*see Matter of Faith J.*, 47 AD3d 630 [2d Dept 2008]; *Matter of Caress S.*, 250 AD2d 490

[1st Dept 1998]]). The hospital records and caseworker's testimony indicate that the mother suffers from paranoid ideation and delusions, evidenced by her belief that people were entering her apartment and her car, putting spoiled food in her refrigerator, and listening to her phone conversations. The caseworker also testified that the home was in deplorable condition, which the mother attributed to the lack of closet space, and that the child had not seen a doctor or dentist in several years. In addition, the court observed that the mother's testimony was unfocused. Petitioner was not obligated to prove that the child suffered past or present harm, since the evidence demonstrated that he was at risk of harm based on demonstrable conduct by the mother (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]).

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

ENTERED: MARCH 28, 2013

CLERK

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

9653 The People of the State of New York, Respondent, Ind. 2703/07

-against-

Karim McLaughlin, etc., Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered May 26, 2009, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 16 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the second felony offender adjudication and remanding for resentencing, and otherwise affirmed.

To the extent that defendant's mistrial motion addressed a portion of the prosecutor's summation that the court had stricken, the court properly exercised its discretion in denying the motion. The remark was not so egregious as to deprive defendant of a fair trial, and the court's curative action was sufficient to prevent any prejudice (*see People v Santiago*, 52

NY2d 865 [1981]).

Defendant's remaining claims of prosecutorial misconduct in cross-examination and summation are unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]) and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). To the extent there were any improprieties, they were harmless. Defendant, who conceded the element of identity, raised an implausible defense, and there is no reasonable likelihood that the alleged errors contributed to the jury's rejection of that defense.

The absence of additional timely and specific objections did not deprive defendant of the effective assistance of counsel (*compare People v Cass*, 18 NY3d 553, 564 [2012], *with People v Fisher*, 18 NY3d 964 [2012]). Regardless of whether trial counsel should have made these objections, we find that defendant has not established that he was prejudiced under either state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

The People do not dispute that defendant's Pennsylvania

robbery conviction fails to qualify as the equivalent of a New York felony conviction. We exercise our interest of justice jurisdiction to reach this unpreserved issue (*see e.g. People v Marino*, 81 AD3d 426 [1st Dept 2011], *lv denied* 16 NY3d 897 [2011]).

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

ENTERED: MARCH 28, 2013

CLERK

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

9654 Laura J. Pietropinto, Index 111532/09
Plaintiff-Respondent,

-against-

Raschell Benjamin,
Defendant-Appellant.

_____

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

Warner & Scheuerman, New York (Jonathan D. Warner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 18, 2012, which, upon reargument, in this action for personal injuries allegedly sustained when plaintiff pedestrian was struck by defendant's vehicle as she crossed the street, vacated its prior order granting defendant's motion for summary judgment dismissing the complaint for failure to meet the serious injury threshold of Insurance Law § 5102(d), and denied defendant's motion, unanimously affirmed, without costs.

Defendant's motion for summary judgment was initially granted on the basis that, in response to defendant's prima facie showing of lack of serious injury, plaintiff failed to make a showing of limitation of range of motion contemporaneous with the accident or to explain her delay in seeking treatment after the

accident. Plaintiff, relying upon the Court of Appeals' decision in *Perl v Meher* (18 NY3d 208 [2011]), moved to renew and reargue. She contended that the absence of contemporaneous range of motion measurements was not fatal to her claim of serious injury to her lumbar spine and that she had adequately demonstrated that her back injuries were caused by the accident.

The record demonstrates that defendant made a prima facie showing that plaintiff did not sustain a serious injury. Defendant submitted the affirmed reports of a neurologist, who found an absence of significant limitations, and of his radiologist, who opined that the disc bulges depicted in plaintiff's MRI were degenerative, which also "strongly suggest[ed]" that the disc herniation was degenerative as well. The fact that the neurologist's report was electronically signed does not render it inadmissible (*see Martin v Portexit Corp.*, 98 AD3d 63, 65-67 [1st Dept 2012]).

In opposition, plaintiff raised a triable issue of fact as to the existence of a "permanent consequential" or "significant limitation" of use of her lumbar spine. Although the MRI report of plaintiff's radiologist is unaffirmed, it is undisputed that the MRI film showed a disc bulge and herniation at the L5-S1 level. The affirmation of plaintiff's orthopedist showing recent

quantified range of motion limitations, positive tests, and permanency provided the requisite proof of limitations and duration of the disc injuries (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 353 [2002]). The orthopedist's affirmation also raised a triable issue as to causation by addressing and disputing the opinion of defendant's radiologist of a degenerative condition, and opining that the disc pathology at the L4-L5 and L5-S1 levels was traumatic in origin (*see Colon v Bernabe*, 65 AD3d 969, 970 [1st Dept 2009]).

Contrary to defendant's contention, the court properly found that plaintiff's testimony, together with the emergency room records and medical records of her primary care physician, provided sufficient evidence that she sought treatment for lower back pain two days after the accident, to demonstrate a causal link between the back injuries and the accident (*see Perl*, 18 NY3d at 217-218; *Salman v Rosario*, 87 AD3d 482, 484 [1st Dept 2011]). The motion court properly considered the unaffirmed medical records for this purpose, since they were not the sole basis for plaintiff's opposition (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660, 661 [1st Dept 2010]).

It is noted, however, that the record establishes, and plaintiff does not dispute, that there is no viable 90/180-day

claim in light of plaintiff's testimony that she only missed a couple of days of work after the accident (*see e.g. Haniff v Khan*, 101 AD3d 643 [1st Dept 2012]).

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

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

ENTERED: MARCH 28, 2013

CLERK

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

9658 The People of the State of New York, Ind. 1676/10
Respondent,

-against-

Gregory Chandler,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and White & Case LLP, New York (Yitzchak M. Fogel of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered March 8, 2011, convicting defendant, after a jury trial, of two counts of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Defendant asserts that the evidence did not establish that he knowingly possessed stolen property. However, defendant was

10 to 15 feet from a car that had just been broken into, and he was carrying two purses that had been taken from the car. In addition, he was carrying the purses in a furtive manner, attempting to put one of the bags underneath his jacket.

A "defendant's knowledge that property is stolen may be proven circumstantially, and the unexplained or falsely explained recent exclusive possession of the fruits of a crime allows a jury to draw a permissible inference that defendant knew the property was stolen" (*People v Landfair*, 191 AD2d 825, 826 [1993], *lv denied* 81 NY2d 1015 [1993]; *see also People v Cintron*, 95 NY2d 329, 332 [2000]). There was no indication that defendant found property that had been stolen by someone else (*compare People v Moore*, 291 AD2d 336 [2002]), and the jury had ample grounds to discredit defendant's implausible testimony that he found the bags and intended to return them to their owners.

Although the same evidence would have also supported a larceny conviction, the jury chose to acquit defendant of the larceny counts. We do not find that this affects the stolen property convictions (*see People v Rayam*, 94 NY2d 557 [2000]).

We see no reason to engage in speculation about the jury's deliberative process (*see e.g. People v Dufresne*, 37 AD3d 235 [2007], *lv denied* 8 NY3d 984 [2007]; *People v Williams*, 239 AD2d 271 [1st Dept 1997], *lv denied* 90 NY2d 899 [1997]).

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

ENTERED: MARCH 28, 2013

CLERK

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

9659 The People of the State of New York, Ind. 7910/00
Respondent,

-against-

Felix Machado,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered October 20, 2011, as amended November 15, 2011, resentencing defendant to an aggregate term of 15 years, to be followed by 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: MARCH 28, 2013

CLERK

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

9660 Rosa Ramos, Index 304024/11
Plaintiff-Respondent,

-against-

24 Cincinatus Corp., et al.,
Defendants-Appellants.

_____

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

Ryan S. Goldstein, PLLC, Bronx (Ryan S. Goldstein of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered February 28, 2012, which, in this personal injury action, to the extent appealed from as limited by the briefs, denied defendant Indera Singh's motion for summary judgment dismissing the complaint as against her, without prejudice, and with leave to renew upon the completion of discovery, unanimously affirmed, without costs.

While a corporate officer may not be held liable for the corporation's wrongs simply because of her status as a corporate officer, "it has long been held by this Court that a corporate officer who participates in the commission of a tort may be held individually liable, . . . regardless of whether the corporate veil is pierced" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st

Dept 2012] [internal quotation marks omitted]). The allegations of the verified complaint and the documentary evidence submitted in opposition to defendants' motion raise sufficient issues of fact as to whether defendant Indera Singh personally committed the alleged tort, or whether she so controlled the corporate defendant as to warrant piercing the corporate veil. Thus, the court properly exercised its discretion by denying the motion with leave to renew following discovery.

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

ENTERED: MARCH 28, 2013

CLERK

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

9661 Carol Wood, Index 602793/09
Plaintiff-Appellant,

-against-

139 East 33rd Street Corp., et al.,
Defendants-Respondents.

_____

Vernon & Ginsburg, LLP, New York (Darryl M. Vernon of counsel), for appellant.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Christopher Cobb of counsel), for respondents.

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Order, Supreme Court, New York County (Louis B. York, J.), entered March 27, 2012, which denied plaintiff's motion for summary judgment, and granted so much of defendants' cross motion as sought summary judgment dismissing the complaint and partial summary judgment on the second, third and fourth counterclaims (for attorneys' fees, breach of contract and promissory estoppel), unanimously modified, on the law, to deny defendants' motion for summary judgment dismissing the first and seventh causes of action (for breach of contract and attorneys' fees) and for partial summary judgment on the counterclaims, and otherwise affirmed, without costs.

The issue of whether defendant coop breached the proprietary lease and the alteration agreement by stopping work that was

proceeding in accordance with plaintiff's approved renovation plans is correctly resolved without regard to the business judgment rule (*Whalen v 50 Sutton Place S. Owners*, 276 AD2d 356 [1st Dept [2000]). Summary judgment in either side's favor on the breach of contract claims is precluded by an issue of fact as to whether plaintiff violated the alteration agreement, raised by the conflicting testimony regarding her allegedly drilling into the ceiling. Plaintiff's claim for attorneys' fees should not be dismissed, because she may prevail in this action, and the proprietary lease provides for legal fees should the coop prevail (see Real Property Law § 234).

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

ENTERED: MARCH 28, 2013

CLERK

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

9663 The People of the State of New York, Ind. 3631/09
Respondent,

-against-

Rodney Capers,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about December 3, 2009, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: MARCH 28, 2013

CLERK

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

9664N In re State of New York - Unified Court System, Petitioner-Appellant, Index 402231/11

-against-

Association of Surrogate's and Supreme Court Reporters Within the City of New York, Respondent-Respondent.

_____

John W. McConnell, New York (Antonio Galvao of counsel), for appellant.

Fulbright & Jaworski L.L.P., New York (Douglas P. Catalano of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), February 29, 2012, compelling arbitration, unanimously reversed, on the law, without costs, and the arbitration is permanently stayed.

While we find no statutory, constitutional or public policy prohibition against arbitration of this dispute as to the termination of an employee (*see Matter of Incorporated Vil. of Lake Grove v Civil Serv. Empls. Assn.*, 118 AD2d 781 [2nd Dept 1986]), a review of the collective bargaining agreement (CBA) discloses that the parties did not agree to arbitrate the dispute (*see Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300,*

Chautauqua County Local 807, 8 NY3d 513, 519 [2007]). Article 12.6 of the CBA provides that an employee aggrieved by a penalty or punishment may appeal from the determination by petition to the Chief Administrative Judge or by an application pursuant to CPLR article 78.

Since the issue whether respondent's claim is a contract grievance or a non-contract grievance does not arise in this matter, Article 16.8 of the CBA is not applicable.

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

ENTERED: MARCH 28, 2013

CLERK

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

9199-
9200 Index 15276/95

Teresa Wynn, as Administratrix of the Estates of Elouise Wynn Squire, Deceased, etc., et al.,
Plaintiffs-Appellants,

-against-

Little Flower Children's Services,
Defendant-Respondent.

_____

Ephrem J. Wertenteil, New York, for appellants.

Shaub Ahmuty Citrin & Spratt, Lake Success (Robert M. Ortiz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about March 23, 2011, reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered August 17, 2011, dismissed, without costs, as academic in light of the foregoing.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Dianne T. Renwick
Darcel D. Clark, JJ.

9199-9200
Index 15276/95

_____x

Teresa Wynn, as Administratrix of the Estates of Elouise Wynn Squire, Deceased, etc., et al.,
Plaintiffs-Appellants,

-against-

Little Flower Children's Services,
Defendant-Respondent.

_____x

Plaintiffs appeal from the order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about March 23, 2011, which granted defendant's motion for summary judgment dismissing the complaint. Appeal from order, same court and Justice, entered August 17, 2011, which denied plaintiffs' motion to renew.

Ephrem J. Wertenteil, New York, for appellants.

Shaub Ahmuty Citrin & Spratt, Lake Success (Robert M. Ortiz and Christopher C. Simone of counsel), for respondent.

ACOSTA, J.

We hold that a child care agency that retains legal authority over a child owes the foster parents a duty to take steps to remove the child where it is placed on sufficient notice by the foster parents that the child is a danger to their household and is asked to remove the child. We find, however, that the record in this case presents an issue of fact as to whether the agency was given the requisite notice. Thus, the agency's motion for summary judgment dismissing the complaint must be denied.

Defendant, Little Flower Children's Services, is a child care agency operating in New York City. In mid-1993, Little Flower placed Glenn G., age 6, and his sister, Shantel G., age 4, in foster care with plaintiff's decedent Elouise Wynn Squire. Elouise lived with her husband, plaintiff's decedent Victor Squire. Elouise entered into a "Foster Parents Agreement" with Little Flower which provided that the agency retained legal custody of Glenn and required Eloise, inter alia, to notify it "immediately" if, for any reason, she could no longer care for Glenn in order to give the agency "as much time as possible" to effect a change in the child's placement.

Little Flower's "Foster Care Program Manual" stated that the agency would not accept for placement children who were

"firesetter[s]," because these "characteristics" were outside of the program's intake criteria. The Program Manual provided for "[e]mergency [t]ransfers" of children to other foster homes on account of "emergency situation[s]."

After about a month in Elouise's care, Glenn began presenting behavioral problems, including engaging in sexual behavior with Shantel, disobeying Elouise, and hitting schoolmates. Elouise complained to Little Flower caseworkers about Glenn's behavior during their visits to her home and on visits to Little Flower's office.

According to Elouise's daughter, Teresa, one day in August 1993, while she was caring for Glenn and Shantel in her home, she smelled smoke. She went to the kitchen and saw Glenn setting paper towels on fire, using the stove's burner. Upon seeing Teresa, Glenn threw the paper towels on the floor and ran into another room. Teresa extinguished the flames and called her mother to tell her what had happened.

Teresa testified that Elouise called Warnee Coleman (Glenn's caseworker), and told her what had happened. Teresa was at Elouise's apartment the next day, when Coleman went to visit Elouise. Coleman told Glenn that he was not to play with the stove or matches. Teresa and Elouise then asked Coleman to have Glenn removed from Elouise's home. Coleman responded that the

agency would take care of it, but that it took time to find a suitable home.

According to Teresa, not long afterwards, she was present in Elouise's apartment when Glenn started another fire, using matches or a lighter to ignite clothing in a hallway closet. Teresa saw smoke coming from the closet, and she and Elouise poured water on the burning clothing. Elouise called the agency to report what had happened. She later told Teresa that Coleman and another caseworker visited her the next day to discuss the second fire.

Notably, however, Elouise's son Melvin, who lived with Elouise during the relevant time period, denied that Glenn ever set a fire in his mother's closet.

Carol, another of Elouise's daughters, testified that, at some point after September 1993, while she was in the bathroom during a visit to her mother's apartment, she "smell[ed] matches." She emerged from the bathroom and saw that Glenn had lit a match in his bedroom, and was still holding a book of matches. Carol told Glenn that he should not play with matches, and took the matches away from him. She went to the kitchen and told Elouise what had happened. Elouise called Little Flower and reported that Glenn had been playing with matches.

Teresa testified that, after the matches incident (the third

fire), she and Elouise went to Little Flower three times to request that the agency remove Glenn from Elouise's home. Teresa also complained to Coleman and two other case workers (Mr. Targ and Mr. Sears) that Glenn needed to be removed from the home and that the agency was "dragging [its] feet."

Melvin testified that Elouise called the agency to complain about Glenn's fire-starting propensities. Notably, however, he denied that his mother ever asked the agency to remove Glenn from her home.

At about 5:00 p.m. on March 22, 1994, Carol and her siblings, Ernest and Joann, visited their mother. Elouise, Victor, Glenn, Shantel, and Carol's daughter, Bianca, were all home. Carol, Ernest, and Joann left the apartment at about 6:30 p.m. When Carol returned about an hour later she saw smoke coming through the door. She knocked on the door and attempted to open it, but the knob was so hot it burned her hand. As she banged on the door, Glenn opened it from the inside and ran out.

Carol tried to enter the apartment, but was prevented by the smoke and flames. She went to a neighbor's apartment, upstairs and called 911 and her sister, Teresa. Firefighters arrived and removed Elouise, Victor, and Bianca from the still-burning apartment. Carol then went downstairs through the smoke-filled hallway and outside, where she lost consciousness. When Teresa

arrived, she saw Carol lying on the ground unconscious. Teresa testified that she heard Glenn tell police officers that he had set the fire.

Meanwhile, a neighbor called Melvin to tell him that his apartment was on fire, and Melvin rushed home. He saw smoke pouring out of the window and Glenn outside with his hands burned. No emergency personnel were present yet. Melvin called 911, and then asked Glenn how the fire had started. Crying, Glenn said that he had set a mattress on fire with matches. Later, at the hospital, Glenn told Teresa that he "didn't mean" to "set the mattress on fire." Fire Department records indicate that, on the night of the fire, Glenn told a fire marshal at the hospital that he set a mattress in the hallway on fire, using a lighter that he took from the kitchen table. The Fire Department investigation confirmed that the fire started on a mattress in the hallway of the apartment.

Victor died from his burns on March 23, 1994. Elouise died five days after the fire, and Shantel died about two weeks after the fire. Bianca survived, with severe scarring to her face and arm.

Coleman testified that Glenn was removed from the home of his previous foster parent, who had complained that Glenn was sexually aggressive towards Shantel. In accordance with agency

policy, Little Flower transferred Glenn and Shantel to Elouise, within 10 days of receiving this complaint.

Glenn lived with Elouise for about six months before the fatal fire. During this time, Coleman visited Elouise's apartment about 10 times. At least two of these visits were in response to complaints that Glenn had hit someone in school and had acted out sexually with his sister. In stark contrast to Teresa's and Carol's assertions, however, Coleman denied ever receiving any complaint about Glenn starting fires or any request to remove him from Elouise's home. Coleman spoke to Glenn after the fatal fire, and Glenn admitted that he started it.

Records produced by Little Flower of all complaints about Glenn made during his time with Elouise indicate that the agency recorded numerous complaints about Glenn (ranging from pulling toys out of the garbage to "sexually acting out" with Shantel). There is, however, no record of any complaint of Glenn starting a fire.

Little Flower moved for summary judgment dismissing the complaint on the grounds that it had no duty to protect foster parents against torts committed by their foster children and that, even if it had such a duty, it lacked notice of Glenn's propensity for starting fires.

A defendant may be liable in negligence only where it owes a

duty of care to the plaintiff (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976]). In general, a defendant will not be liable for the conduct of third persons who cause harm to others (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 233 [2001]). However, the duty to control a third person's conduct may arise when the defendant has authority to do so, and because of either the relationship between the defendant and the third person or the relation between the defendant and the plaintiff (*id.*). An example is the parent-child relationship (*see id.*).

Thus, a child care agency, acting in loco parentis, has a duty to exercise reasonable care to prevent foster children under its supervision and control from harming others (*see DiCarlo v City of New York*, 286 AD2d 363 [2d Dept 2001]), except during times when the children are in the physical custody of another entity, such as a school (*see Howard v Parsons' Child & Family Ctr.*, 306 AD2d 725, 726 [3d Dept 2003]; *Cappello v St. Christopher's, Jennie Clarkson Child Care Servs.*, 282 AD2d 566 [2d Dept 2001]).

Of course, Little Flower, while it retained legal control over Glenn, had relinquished day-to-day physical custody and control of him to Elouise, and by analogy to *Howard* and *Cappello*, it arguably had no duty to protect her from harm caused by him. The analogy, however, is not complete. We find that even if

Little Flower did not have a duty to control Glenn while he was in Elouise's physical custody, it nonetheless had a duty to remove him from her home upon notice of his propensity for setting fires and upon her request. Indeed, the Foster Parents Agreement requires the foster parent to notify the agency immediately if she can no longer care for the child to give the agency "as much time as possible" to change the child's foster placement, and case worker Coleman testified that it was the agency's practice to effect a transfer within 10 days of receiving such notice. Moreover, the Program Manual states that the agency will not accept a child who is a "firesetter" for placement.

In determining that a "duty to remove" may exist, we have considered "the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (*Hamilton*, 96 NY2d at 232 [internal quotation marks omitted]). We are "mindful of the precedential, and consequential, future effects of [this] ruling[], and limit the legal consequences of [the] wrong[s] [at issue] to a controllable degree" (*see id.* [internal quotation marks omitted).

We find that Elouise had a reasonable expectation that a firesetter would not be placed in her home. Indeed, it was Little Flower's policy not to place children who were "firesetters." Society too has a reasonable expectation that a firesetter will be removed from a foster home upon notice of the child's firesetting propensities and upon the foster parent's request. A child care agency is not simply a distribution center; it must consider each child's special needs and the foster parents' ability to care for those needs (*see* 18 NYCRR 430.11[d][2]; *see also* New York State Department of Social Services *1988 Model Foster Parent Manuel* at 3 [foster parent must be able to "provide for the physical, emotional, social, and educational needs of children who may be placed in the home]; *New York State 2010 Foster Care Manual* at 12 ["In placing a child in a foster home, agency staff try to find a home that best suits the child's needs," by considering, among other factors, whether "the child [has] special physical, *psychological*, or medical needs that require a foster home that is equipped and trained to handle them" and whether the foster home can meet the child's "specific emotional needs" (emphasis added)]).

There is no indication in the record that recognizing a duty to remove in these circumstances would lead to a proliferation of claims against child care agencies or given defendant's internal

policy against placing firesetters, and caseworkers' monitoring of their agency's foster children in general, that unlimited or insurer-like liability would likely ensue since a child could be removed at the earliest signs of firesetting propensities, or at least when the foster parents asked to have the child removed because of firesetting propensities. Indeed, there appears to be a disproportionate risk to foster parents who unknowingly take on a firesetter and then have their pleas for the agency to remove the child ignored.

With respect to reparation allocation, the agency is in the best position to remove the child from the home of foster parents who are incapable of dealing with him and place him in a setting where his individual needs can be met. Moreover, public policy favors imposing the duty to remove a child from a home of foster parents who are not equipped to deal with a child's dangerous propensities, for the sake of the safety of both the child and the parents.

Thus, on balance, the relevant factors support the imposition on a child care agency of a duty to remove a child from the home of foster care parents who are incapable of dealing with a child's dangerous propensities and have asked the agency to remove the child immediately. This conclusion is consistent with the requirement "that the damaged plaintiff be able to point

the finger of responsibility at a defendant owing, not a general duty to society, but a specific duty to him [or her]" (see *Johnson v Jamaica Hosp.*, 62 NY2d 523, 527 [1984]; *see also, Lauer v City of New York*, 95 NY2d 95, 100 [2000], *Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 341 [1928]). Little Flower itself acknowledged the dangerousness of a child's propensity to set fires, and foresaw precisely the kind of eventuality presented here. The duty to remove is thus specific and narrow in scope.

Having found a duty to remove on Little Flower's part, we turn to whether Little Flower breached the duty. We find that the record does not permit a determination as a matter of law. While the agency's records do not refer to Glenn's firesetting propensities or to a request by Elouise that he be removed from her home, there is testimonial evidence that Elouise and her daughters told agency caseworkers that Glenn had set fires and asked the agency to remove him. Contrary to he motion court's finding, this testimony is not inadmissible hearsay. The testimony is based on the witnesses' firsthand observations. Moreover, Elouise's statements to the agency about the fires were offered not for their truth, but to demonstrate that the agency was on notice of the child's propensity to set fires (*see Stern v Waldbaum, Inc.*, 234 AD2d 534 [2d Dept 1996]). Even assuming that the out-of-court statements are hearsay, they need not be

rejected, because they are not the only evidence submitted in opposition to Little Flower's motion (*see Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100 [1st Dept 1999]). For example, Teresa testified that she and Eloise asked caseworker Coleman to remove Glenn from Elouise's home.

Nor, contrary to Little Flower's argument, is this testimony incredible as a matter of law. The chief inconsistency identified by the agency is that between Teresa and Carol's testimony and Melvin's testimony. This inconsistency presents issues of credibility, which is the function of a jury, not the court on a motion for summary judgment, to resolve. A jury may ultimately find that Elouise never placed Little Flower on notice of Glenn's firesetting propensities or asked that he be removed, but that finding is solely for the jury to make. Similarly, whether, as the motion court found, Elouise was partly at fault for disconnecting smoke detectors on the night of the fire or for leaving matches where Glenn would have access to them is for the jury to decide, assuming evidence sufficient to support such findings is placed before them at trial.

Accordingly, the order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about March 23, 2011, which granted defendant's motion for summary judgment dismissing the complaint, should be reversed, on the law, without

costs, and the motion denied. Appeal from order, same court and Justice, entered August 17, 2011, which denied plaintiffs' motion to renew, should be dismissed, without costs, as academic in light of the foregoing.

All concur.

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

ENTERED: MARCH 28, 2013

CLERK