



Under the parties' Producer Agreement, pursuant to which defendant procured insurance for its clients through plaintiff, defendant is obligated to pay all insurance premiums, including those that plaintiff retroactively increased upon audit. Section 5.3 of the agreement states that "[defendant] guarantees to pay [plaintiff] *all premium [sic]* . . . on any insurance placed or arranged for [defendant] by [plaintiff], irrespective of whether [defendant] has collected *such premiums* . . . from any customer or client of [defendant]" (emphasis added). Contrary to defendant's contention, the term "all premium" does not refer to the "initial premium" only. Accordingly, the court properly granted plaintiff summary judgment as to defendant's liability for the retroactive increases.

But it was incorrect for the court to proceed as though the invoices were correct and hold that defendant lacked standing to challenge plaintiff's calculation of the premium amounts due. Given that the Producer Agreement did not provide that defendant waived any defenses and that the guarantee was unconditional, defendant was entitled to raise the insureds' defense that the audits were inaccurate and the increases were excessive under the policies (see Restatement [Third] of Suretyship & Guaranty § 34;

*see also Sterling Natl. Bank v Biaggi*, 47 AD3d 436, 436-437 [1st Dept 2008]). Thus under CPLR 3212(f), defendant was entitled to disclosure about the audits that plaintiffs used to calculate the premium increases before damages were determined.

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

ENTERED: NOVEMBER 26, 2013

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CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10650-

Ind. 4242/98

10651 The People of the State of New York,  
Respondent,

-against-

Roger Thomas,  
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York  
(Kerry S. Jamieson of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (James A. Yates, J.  
at charge reinstatement; Ruth Pickholz, J. at retrial and  
sentencing), rendered October 2, 2009, as amended December 18,  
2009 and January 4, 2010, convicting defendant, after a jury  
trial, of attempted rape in the first degree and assault in the  
second degree, and sentencing him to concurrent terms of 4 to 8  
years and 1½ to 3 years, respectively, unanimously affirmed. The  
matter is remitted to Supreme Court, New York County, for further  
proceedings pursuant to CPL 460.50(5).

Defendant was indicted for attempted rape in the first  
degree and assault in the second degree. At his first trial, the  
jury found him guilty on the assault charge and deadlocked on the

attempted rape charge. At sentencing, the court orally pronounced a sentence of two to four years on the assault charge and immediately dismissed the attempted rape charge upon the People's motion. Defendant then successfully appealed from his conviction on the assault charge, and this Court remanded for a new trial (47 AD3d 415 [1st Dept 2008], *lv denied* 10 NY3d 772 [2008]).

Upon remand, Supreme Court properly determined that the People were permitted to re prosecute the attempted rape charge, because that count of the indictment was deemed reinstated pursuant to CPL 470.55(1). Although the statute provides that a count is not deemed reinstated if it was dismissed on a "post-judgment order" (CPL 470.55[1][b]), the dismissal of the attempted rape charge occurred between the oral imposition of sentence and the entry of judgment (see *People v Jian Jing Huang*, 1 NY3d 532 [2003]). There is nothing in the record to indicate that, before dismissing the count at issue, the court had done anything that could be construed as entry of a judgment. Since a judgment "is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence" (CPL 1.20 [15][emphasis added]), "post-judgment" can only mean after entry.

Double jeopardy concerns did not bar retrying defendant on the attempted rape count. The first jury never returned any verdict on that count. Furthermore, defendant had no legitimate expectation that the dismissal of that count was final and irrevocable (*see People v Williams*, 14 NY3d 198, 214 [2010], *cert denied* \_\_US\_\_, 131 S Ct 125 [2010]). As noted, the statute provides that a reversal granting a new trial would automatically reinstate any counts dismissed under the circumstances presented here. Moreover, the record establishes that when the People moved to dismiss, they were engaging in the common practice of dismissing a charge as sufficiently covered by a conviction on another charge, an exercise of prosecutorial discretion that was frustrated by the reversal of the conviction. Defendant had no legitimate expectation that in the event of a reversal he would receive the windfall of having the dismissed charge stay dismissed.

Defendant did not preserve his claims that reinstatement of the charge violated due process concerns, or his claims that his statutory and constitutional speedy trial rights were violated, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

At the retrial, defendant's motion for a trial order of

dismissal did not include a claim that the shoe he used to beat the victim was not proven to be a "dangerous instrument," and his request for submission of third-degree assault as a lesser included offense did not include a claim that there was a corresponding reasonable view of the evidence regarding that issue. Accordingly, his present arguments along those lines are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The men's dress shoe, used in a manner which rendered it readily capable of causing serious physical injury to the victim, was a dangerous instrument (see *People v Carter*, 53 NY2d 113, 116 [1981]), and there was no reasonable view of the evidence to the contrary.

Defendant did not preserve his challenges to the court's rulings on two issues relating to jurors, and we reject defendant's arguments regarding preservation of these issues. We decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that in each instance the court's ruling was a proper exercise of discretion.

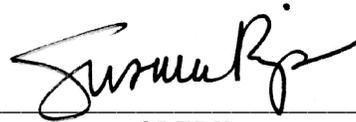
The prosecutor's use of some leading questions in examination of the victim does not warrant reversal. In the instances where defendant objected to a question as leading and

the court overruled the objection, the court acted within its discretion in allowing the question. Defendant's remaining challenges to allegedly leading questions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the use of leading questions was not so egregious that it deprived defendant of a fair trial.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 26, 2013

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CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10890 Ruby Scafe,  
Plaintiff-Respondent,

Index 303167/07

-against-

Schindler Elevator Corp.,  
Defendant-Appellant.

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Keller, O'Reilly & Watson, P.C., Woodbury (Kevin W. O'Reilly of  
counsel), for appellant.

Steven C. Rauchberg, P.C., New York (Steven C. Rauchberg of  
counsel), for respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.),  
entered August 30, 2012, which denied defendant's motion for  
summary judgment dismissing the complaint, unanimously affirmed,  
without costs.

"On a motion for summary judgment, the movant bears the  
burden of adducing affirmative evidence of its entitlement to  
summary judgment" (*Cole v Homes for the Homeless Inst., Inc.*  
93 AD3d 593, 594 [1st Dept 2012]). Defendant, the exclusive  
elevator maintenance contractor, did not make a prima facie  
showing that it either lacked actual or constructive notice of  
any condition or defect in the subject elevator that would have  
caused the doors to quickly slam shut and trap plaintiff's hand  
as she exited, or that it did not fail to use reasonable care to

correct a dangerous condition that it should have been aware of (see *Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]).

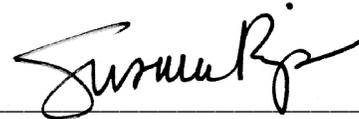
Documents produced by defendant, which contain numerous references to recurring problems, some from which it can be reasonably inferred that the doors may have been involved, did not necessarily explain the cause of the defects previously found, and the deposition testimony of defendant's employee did not establish the lack of notice of the condition that caused plaintiff's accident (see *Romero v Morrisania Towers Hous. Co. Ltd. Partnership*, 91 AD3d 507, 507-508 [1st Dept 2012]).

Defendant's reliance upon that employee's affidavit to cure his deposition testimony is unavailing. The affidavit improperly alleges, for the first time in reply, that the employee had personal knowledge of conducting an inspection on the date of the accident (see *Matter of Cintron v Calogero*, 99 AD3d 456, 458 [1st Dept 2012]) and was improperly tailored to overcome his prior testimony (see *Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]). Moreover, there is no dispute that the elevator had been out of service for 3 straight days, undergoing 24 hours of labor immediately before plaintiff's incident (see *Ruiz-Hernandez v TPE NWI Gen.*, 106 AD3d 627 [1st Dept 2013]).

Given the insufficiency of defendant's moving papers, we need not address plaintiff's opposition papers (*Romero*, 91 AD3d at 508) or consider whether the doctrine of *res ipsa loquitur* applies.

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ENTERED: NOVEMBER 26, 2013

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*denied* 21 NY3d 1014 [2013]). “A request to present additional evidence in this type of situation should be addressed to the court’s discretionary power to alter the order of proof within a proceeding (see *People v Whipple*, 97 NY2d 1, 6 [2001]), rather than being governed by the restrictions on rehearings set forth in *People v Havelka* (45 NY2d 636 [1978])” (*id.* at 481).

Defendant argues that since the reopening came after defense counsel had pointed out a deficiency in the People’s case, there was a heightened risk of tailored testimony. However, “one of the purposes of requiring timely and specific motions and objections, a requirement applicable to suppression hearings, is to provide the opportunity for cure (*People v Cestalano*, 40 AD3d 238, 239 [1st Dept 2007], *lv denied* 9 NY3d 921 [2007] [internal citations and quotation marks omitted]). It would be illogical to require a defendant, for preservation purposes, to point out a deficiency at a time when it can be corrected, but then preclude the People from correcting the deficiency. In *Whipple*, the Court of Appeals disapproved of such a notion, which it described as “a sort of ‘gotcha’ principle of law” (97 NY2d at 7).

Under the circumstances here, we do not find that there was a significant risk of tailoring, particularly since the officer was subject to cross-examination regarding whether he had

discussed his testimony with the prosecutor. In any event, “we believe that the hearing court was more than up to the task of evaluating the risk of manufactured testimony” (*People v Alvarez*, 51 AD3d 167, 179 [2008], *lv denied* 11 NY3d 785 [2008]).

The court properly denied defendant’s suppression motion. There is no basis for disturbing the court’s credibility determinations. When an officer saw defendant with an open beer bottle in a public place, in violation of the Open Container Law (Administrative Code of City of NY § 10-125[b]), the officer had authority to arrest defendant (*see People v Lewis*, 50 AD3d 595 [1st Dept 2008], *lv denied* 11 NY3d 790 [2008]). The officer did not recover the contraband that is at issue on appeal until after defendant was under arrest. It is irrelevant whether the officer subjectively decided to arrest defendant after discovering other contraband, not at issue on appeal, as the result of a frisk that defendant challenges as unlawful. An “arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause” and “his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause” (*Devenpeck v Alford*, 543 US 146, 153 [2004]; *see also People v Robinson*, 97 NY2d 341, 349 [2001]). Since there was a valid custodial arrest for the open

container violation, the officer's search of defendant incident to that arrest was proper, and the subsequent fruits were lawfully obtained (see *People v Rodriguez*, 84 AD3d 500, 501 [1st Dept 2011], *lv denied* 17 NY3d 861 [2011]).

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

ENTERED: NOVEMBER 26, 2013

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CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11153- Index 6149/00

11154-

11154A Lynda Antonetti, et al.,  
Plaintiffs-Appellants,

-against-

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

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Rovegno & Taylor, P.C., Great Neck (Robert B. Taylor of counsel),  
for appellants.

Garbarini & Scher, P.C., New York (Thomas M. Cooper of counsel),  
for respondents.

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Judgment, Supreme Court, Bronx County (John A. Barone, J.),  
entered January 17, 2012, dismissing the complaint, unanimously  
modified, on the law, to vacate the judgment with respect to  
defendant Board of Education, and otherwise affirmed, without  
costs. Appeal from order, same court and Justice, entered  
January 12, 2012, which granted defendants' motion for summary  
judgment, unanimously dismissed, without costs, as subsumed in  
the appeal from the judgment. Appeal from order, same court and  
Justice, entered June 6, 2012, which denied plaintiffs' motion to  
renew and reargue, unanimously dismissed, without costs, as taken  
from a nonappealable paper insofar as it is addressed to the  
denial of reargument, and, as subsumed in the appeal from the

judgment insofar as it is addressed to the denial of renewal, .

We affirm the dismissal of the complaint as against the City, because the City is a legal entity separate from the Board of Education and cannot be held liable for torts committed by the Board (*see Perez v City of New York*, 41 AD3d 378, 379 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]).

However, the court erred in granting defendants' motion for summary judgment dismissing the complaint as against the Board of Education on the ground that the Board did not owe plaintiff Lynda Antonetti a special duty. The argument that the Board owed no special duty to plaintiff is barred by equitable estoppel and because defendants raised it for the first time in their reply brief. An order of the Supreme Court (Stanley Green, J.), entered January 9, 2012, which denied defendants' motion for leave to amend their answer to deny that the Board of Education operated the premises on which plaintiff's injury occurred, became law of the case binding the trial court when defendants failed to appeal it, and cannot be challenged on this appeal (*see Hallsville Capital, S.A. v Dobrish*, 87 AD3d 933, 934 [1st Dept 2011]). The court found that defendants were estopped from amending the answer because their motion for leave was made six years after the commencement of the action and more than two

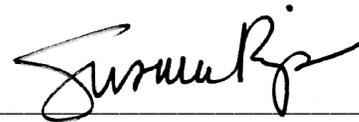
years after the expiration of the statute of limitations.

In light of defendants' delay in moving for leave to amend, the doctrine of equitable estoppel arises from plaintiffs' reasonable reliance, to their detriment, upon the representations set forth in defendants' joint verified answer (see *Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668 [1976]; *Blount v Bovis Lend Lease Holdings, Inc.*, 35 AD3d 310 [1st Dept 2006]).

The argument having been raised for the first time in defendants' reply brief, plaintiffs had no opportunity to respond to it (see *Caribbean Direct, Inc. v Dubset LLC*, 100 AD3d 510 [1st Dept 2012]).

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

ENTERED: NOVEMBER 26, 2013

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CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11155 Cynthia Dawkins, Index 104538/08  
Plaintiff-Appellant,

-against-

Elizabeth Cartwright, et al.,  
Defendants,

Metropolitan Life Insurance Company,  
Defendant-Respondent.

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John V. Decolator, Garden City, for appellant.

White & McSpedon, P.C., New York (Michael Cannella of counsel),  
for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered April 9, 2012, which, to the extent appealed from as limited by the briefs, granted the motions of defendants Metropolitan Life Insurance Company and Elizabeth Cartwright for summary judgment dismissing the complaint in its entirety on the ground that plaintiff failed to establish a serious injury under the "permanent consequential" or "significant" limitation of use categories of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants met their prima facie burden of showing that plaintiff did not suffer a serious injury causally related to the subject motor vehicle accident, by submitting, among other

things, the affirmed report of their radiologist, who opined that the conditions shown in the MRIs taken of plaintiff's lumbar and thoracic spine were chronic and degenerative in origin and that there was no evidence of acute traumatic injury (see *Cruz v Martinez*, 106 AD3d 482, 482 [1st Dept 2013]). Defendants' neurologist also opined, based on his examination of plaintiff and review of her medical records, that plaintiff had preexisting lumbar and cervical spine symptomology and that there was no evidence of any significant injuries resulting from the subject accident. Moreover, defendants submitted plaintiff's medical records, which demonstrated that plaintiff, who was 52 and described as morbidly obese, was receiving physical therapy for chronic lower back pain prior to the accident.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's radiologist observed degenerative changes and her treating physician did not review any records of plaintiff's prior medical treatment, although her own record of plaintiff's initial examination showed that plaintiff complained of chronic lower back pain since 1999. In these circumstances, the treating physician's conclusory opinion that there was a causal connection between the injuries and the subject accident was insufficient to raise an issue of fact (see *Cruz*, 106 AD3d at 482; *Pommells v*

*Perez*, 4 NY3d 566, 574-575 [2005]).

We need not consider plaintiff's claim in her appellate brief that she sustained a serious injury to her left knee, as she did not allege such injury in her bill of particulars (see *Marte v New York City Tr. Auth.*, 59 AD3d 398 [1st Dept 2009]).

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

ENTERED: NOVEMBER 26, 2013

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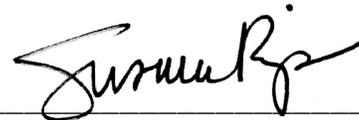
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complete any sex offender treatment program, and has a cognitive disorder causing him to believe that his victims have consented to sexual activity (see *People v Derrick S.*, 93 AD3d 423 [1st Dept 2012]). Respondent presents no basis to disturb the court's credibility determinations.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 26, 2013

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CLERK



striking the bus' front bumper. Defendant bus driver was forced to stop suddenly in order to avoid colliding with the car (see *Brooks v New York City Tr. Auth.*, 19 AD3d 162 [1st Dept 2005]; *Gonzalez v City of New York*, 295 AD2d 122 [1st Dept 2002]).

In opposition, plaintiff failed to raise a triable issue of fact as to defendants' negligence. Plaintiff may not rely on statements she entered in the errata sheet to her deposition transcript, as these corrections were untimely (see CPLR 3116[a]).

Plaintiff's assertion in her opposition affidavit, that "[n]o car ever cut the bus off at any time prior to [her] accident," is also unavailing, since it contradicts her deposition testimony. Moreover, even the corrected version of plaintiff's deposition testimony fails to raise a triable issue of fact.

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

ENTERED: NOVEMBER 26, 2013



CLERK





Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11160- Index 602069/09  
11161-  
11162 Hartford Underwriting Insurance Company,  
Plaintiff-Respondent-Appellant,

-against-

Greenman-Pederson, Inc., et al.,  
Defendants-Respondents,

The Port Authority of New York  
& New Jersey, et al.,  
Defendants-Appellants-Respondents,

Koch Skanska USA, et al.,  
Defendants.

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Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio  
of counsel), for appellants-respondents.

Lazare, Potter & Giacovas, LLP, New York (Stephen M. Lazare of  
counsel), for respondent-appellant.

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for  
Greenman-Pederson, Inc., respondent.

Carroll McNulty & Kull LLC, New York (Kristin V. Gallagher of  
counsel), for Continental Casualty Company, respondent.

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Order, Supreme Court, New York County (Carol Edmead, J.),  
entered August 15, 2012, which superseded a March 9, 2012 order,  
granted defendant Greenman-Pederson, Inc.'s (GPI) cross motion  
for summary judgment and declared that plaintiff Hartford and  
defendant-appellant Syndicate 2020 at Lloyd's of London (Lloyd's)

had a duty to defend and indemnify GPI in the underlying action, and denied Hartford's motion and Lloyd's cross motion for summary judgment seeking declaratory relief against GPI, denied defendant-respondent Continental Casualty Company's (Continental) cross motion for summary judgment seeking a declaration that its policy was excess to the Hartford and Lloyd's policies, and granted GPI's motion for summary judgment for reasonable attorneys' fees against Hartford in defending this action and referred the issue of the amount of such fees to a special referee, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered March 9, 2012 and June 26, 2012, unanimously dismissed, without costs, as academic.

"[I]t is the responsibility of the insurer to explain its delay" (*First Fin. Ins. Co. v Jetco Contr. Corp*, 1 NY3d 64, 70 [2003]). Hartford undisputably had a pre-claim report of the 200 accident in 2006. Hartford had every opportunity to investigate and disclaim, yet it failed to do so until at least 2009, fully one year after GPI was added to the underlying action as a defendant.

Hartford claims that its duty to disclaim was not triggered until it received the summons and complaint, yet, "once the insurer has sufficient knowledge of facts entitling it to

disclaim, or knows that it will disclaim coverage, it must notify the policyholder in writing as soon as is reasonably possible" (*id.* at 66). Even assuming that Hartford's duty to disclaim was not triggered until it received the complaint in 2008, Hartford fails to explain why it did not disclaim until 2009.

Hartford's contention that its reservation of rights letters, issued in 2006 and 2008, constituted a clear disclaimer of coverage should be rejected. While the language in *QBE Ins. Corp. v Jinx-Proof Inc.*, 102 AD3d 508, 511 [1st Dept 2013], a case on which Hartford relies, clearly stated that "QBE will not be defending or indemnifying you," the language in this case is not so clear. In contrast to *QBE*, the underlying action here recited allegations of both professional and general negligence against GPI. Unlike *QBE's* letter, Hartford's 2006 and 2008 letters failed the essential purpose of a disclaimer: to timely and clearly inform the insured of where the insurer stands on the issue of coverage for the action, and why, so that the insured can promptly consider appropriate alternatives (*see First Fin. Ins. Co.*, 1 NY3d at 68).

Before the motion court, Lloyd's raised a new reason for disclaimer: the failure to comply with the supposed policy condition that notice be given to Aon, Limited in England. This

argument is unavailing, as the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated, and any ground known to the insurer but not then asserted is waived (*Paul M. Maintenance, Inc. v Transcontinental Ins. Co.*, 300 AD2d 209, 212 [1st Dept 2002]).

For the first time on appeal, Lloyd's further contends that, if there is coverage under the OCIP Policy, it is excess to the coverage provided by Hartford and Continental. This argument should be rejected, as the OCIP Policy expressly states that it provides primary insurance, regardless of whether other insurance is available to the insureds. Because Lloyd's received proper notice of the underlying claim from Hartford, but failed to disclaim in a timely manner, it is estopped from denying coverage to GPI (see *J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 269 [1st Dept 2009], *lv dismissed* 13 NY3d 889 [2009]). Lloyd's argument submitted for the first time on appeal, that the motion court improperly allocated defense costs because it is a second level excess policy and no determination was made that the

first level of excess insurance had been paid, is unavailing, as the first level policy was apparently never produced before, or considered by, the motion court and is not part of the record on appeal.

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

ENTERED: NOVEMBER 26, 2013

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Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11163 Martha Munasca, Index 307306/08  
Plaintiff-Appellant,

-against-

Morrison Management LLC, et al.,  
Defendants-Respondents.

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Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Carmen A. Mesorana of counsel), for appellant.

Thomas M. Bona, P.C., White Plains (Anthony M. Napoli of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 22, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to establish entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she tripped and fell on a sidewalk defect in front of premises owned and operated by defendants. The pictures submitted by defendants in support of their motion do not unequivocally demonstrate that the complained-of defect is trivial as a matter of law since its size is not discernable and the photos appear to show that the defect has an edge, which could constitute a tripping hazard (*see Abreu v New York City*

*Hous. Auth.*, 61 AD3d 420 [1st Dept 2009])). There is also no evidence showing the defect's dimensions at the time of the accident (see *Valentin v Columbia Univ.*, 89 AD3d 502, 503 [1st Dept 2011])).

Defendants' reliance on plaintiff's testimony that the height difference between the sidewalk flags at the time of her accident was approximately one inch, is insufficient to satisfy their prima facie burden, since the testimony was at best an estimate of the actual size of the defect, and was not based on an actual measurement (cf. *Vazquez v JRG Realty Corp.*, 81 AD3d 555 [1st Dept 2011])). Furthermore, plaintiff's deposition testimony suggesting that, because "there were a lot of people at the bus stop" at the time of the accident, it was difficult to detect the defect, raises factual questions requiring a trial (see *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000])).

Defendants' argument that they were not responsible for the defect either because it was "patchwork" around a lamp post, or because it was at a bus stop is unavailing. The photographs in the record do not appear to depict patchwork for which the City

might be responsible (see Administrative Code of City of NY § 19-152[a]), and defendants submitted no evidence to establish that the area was a designated bus stop maintained by the City (*cf. Phillips v Atlantic-Hudson, Inc.*, 105 AD3d 639 [1st Dept 2013]).

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

ENTERED: NOVEMBER 26, 2013

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CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11164        In re Michael Joseph C.,  
  
              A Person Alleged to  
              be a Juvenile Delinquent,  
              Appellant.  
              - - - - -  
              Presentment Agency

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Larry S. Bachner, Jamaica, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris  
of counsel), for presentment agency.

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Order, Family Court, New York County (Susan R. Larabee, J.),  
entered on or about November 9, 2012, which adjudicated appellant  
a juvenile delinquent upon his admission that he committed an  
that, if committed by an adult, would constitute the crime of  
possession of graffiti instruments, and placed him with the  
Administration for Children's Services' Close to Home Program for  
a period of 12 months, with credit for time spent in detention,  
unanimously affirmed, without costs.

The disposition was the least restrictive dispositional  
alternative consistent with appellant's needs and the community's  
need for protection (see *Matter of Katherine W.*, 62 NY2d 947  
[1984]). Although the delinquency adjudication was based on a  
relatively minor offense, the court was entitled to consider

appellant's entire background, which included a serious history of violence, as well as appellant's commission of unlawful acts while already on probation.

Appellant's admission met all constitutional and statutory requirements. As in the comparable situation of a guilty plea entered by an adult (see *People v Goldstein*, 12 NY3d 295 [2009]), specific factual recitals supporting the elements of the crime are not required to support an admission of juvenile delinquency (*Matter of Jermaine J.*, 6 AD3d 87, 91-93 [2004], *lv denied* 3 NY3d 606 [2004]). Appellant's allocution neither negated any element nor cast doubt on his guilt.

We have considered and rejected appellant's remaining claims.

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

ENTERED: NOVEMBER 26, 2013

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CLERK



There was no rational basis for the jury to find that defendant stole the merchandise, but changed his mind and used force only to "return" it.

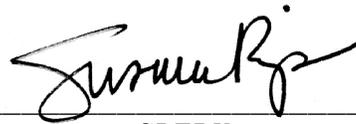
Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established the element of physical injury (see e.g. *People v Wise*, 99 AD3d 584, 585 [1st Dept 2012], *lv denied* 21 NY3d 1011 [2013]). In this regard, we find no basis for disturbing the jury's credibility determinations with respect to the testimony of the victim and an eyewitness. The evidence supports the conclusion that the victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A .*, 49 NY2d

198, 200 [1980]), and that they caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; see also *People v Guidice*, 83 NY2d 630, 636 [1994]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 26, 2013

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CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11166 Weisman, Celler, Spett & Modlin, Index 651782/12  
Plaintiff-Appellant,

-against-

Fischbach LLC,  
Defendant-Respondent.

[And a Third-Party Action]

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Weisman Celler Spett & Modlin, P.C., New York (John B. Sherman of counsel), for appellant.

Gardere Wynne Sewell LLP, Dallas, TX (Scott L. Davis of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 20, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In 1994, plaintiff law firm commenced an action (the prior action) against its former client, Fischbach Corporation (the predecessor-in-interest to defendant Fischbach LLC), to recover fees for services rendered between 1986 and 1991. Nothing happened in the prior action between March 1995 and June 2011, when plaintiff sought to resume activity. In response, defendant moved to dismiss pursuant to, inter alia, CPLR 3216. By order

entered December 12, 2011, the court (Eileen A. Rakower, J.) denied the motion because defendant had failed to serve the required 90-day notice.

In 1995, plaintiff - a partnership - changed its structure to a professional corporation, and assigned its claims against Fischbach to Weisman Celler Spett & Modlin, P.C. (the P.C.). In March 2012, plaintiff moved, inter alia, to substitute the P.C. for itself in the prior action. By order entered May 8, 2012, the court (Rakower, J.) denied the motion and dismissed the action because plaintiff had failed to moved to substitute within a reasonable time. In the order, the court noted that, "from in or around January 1995 until [the] summer of 2011, no actions were taken by either party to conduct discovery or otherwise advance the litigation."

On May 16, 2012, plaintiff and the P.C. entered into an agreement declaring the 1995 assignment null and void ab initio and assigning the claim against Fischbach back to plaintiff. On May 23, 2012, plaintiff commenced the instant action, again seeking fees for services rendered between 1986 and 1991. After answering, defendant moved for summary judgment dismissing the complaint on the ground, inter alia, that it was time-barred.

The court correctly granted the motion. Contrary to

plaintiff's claim, CPLR 205(a) does not save the instant action, because the prior action was dismissed for neglect to prosecute (see e.g. *Rumola v Maimonides Med. Ctr.*, 88 AD3d 781 [2d Dept 2011]). Plaintiff contends that *Rumola* is distinguishable because the prior action in that case was dismissed "with prejudice" (88 AD3d at 781). However, whether the prior action was dismissed with prejudice has no bearing on whether it was dismissed for neglect to prosecute.

Nor does the fact that the court denied defendant's CPLR 3216 motion in December 2011 preclude the May 2012 dismissal from being for neglect to prosecute, since "the 'neglect to prosecute' exception in CPLR 205(a) applies not only where the dismissal of the prior action is for '[w]ant of prosecution' pursuant to CPLR 3216, but whenever neglect to prosecute is in fact the basis for dismissal" (*Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterria Assoc.]*, 5 NY3d 514, 520 [2005]; see e.g. *Quintana v Wallace*, 15 Misc 3d 1139[A], 2007 NY Slip Op 51039[U], \*2-3 [Sup Ct, Nassau County 2007]).

In light of the foregoing, we need not reach plaintiff's argument that it has capacity to sue under Partnership Law § 61 because, 17 years after its dissolution, it is still winding up its affairs by pursuing its claim against defendant.

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

ENTERED: NOVEMBER 26, 2013

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CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11167 Antonio Carlos Cruz, Index 18266/07  
Plaintiff-Appellant,

-against-

MTLR Corp., et al.,  
Defendants-Respondents,

Jaime Piscil, et al.,  
Defendants.

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Kahn Gordon Timko & Rodriques, P.C., New York (Nicholas I. Timko  
of counsel), for appellant.

Weiner, Millo, Morgan & Bonanno, LLC, New York (John P. Bonanno  
of counsel), for respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.),  
entered November 5, 2012, which, insofar as appealed from as  
limited by the briefs, granted the motion of defendants-  
respondents for summary judgment dismissing the complaint and all  
cross claims against them, and denied plaintiff's cross motion  
for partial summary judgment on liability as against defendants-  
respondents Jerry WWHS Co. and Jose Pagan, unanimously affirmed,  
without costs.

The court properly found that respondents sustained their  
burden of demonstrating that the accident was not caused by  
defendant driver Pagan's negligence, and that he was confronted

by an emergency situation not of his making, when the vehicle in which plaintiff was a passenger made a wide right turn into Pagan's lane, opposite the direction of traffic, and collided head-on with Pagan's truck. "A driver in his proper lane is not required to anticipate that an automobile going in the opposite direction will cross over into his lane" (*Williams v Simpson*, 36 AD3d 507, 508 [1st Dept 2007]).

Plaintiff failed to raise a triable issue of fact as to the emergency nature of the situation confronted by Pagan, when he hit the brakes "seconds" before the collision with the other vehicle, which Pagan testified was "on top" of his truck.

"[C]ourts have repeatedly rejected, as a basis for imposing liability, speculation concerning the possible accident-avoidance measures of a defendant faced with an emergency" (*Caban v Vega*, 226 AD2d 109, 111 [1st Dept 1996]).

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

ENTERED: NOVEMBER 26, 2013



CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11168-

Index 303550/09

11169 Sandra Paucar, et al.,  
Plaintiffs-Appellants,

-against-

Patrice Solaro, et al.,  
Defendants-Respondents.

---

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

Devitt Spellman Barrett, LLP, Smithtown (John M. Denby of counsel), for Patrice and Maria Solaro, respondents.

Pillinger Miller Tarallo, LLP, Elmsford (Shawn M. Weakland of counsel), for Robert Doerr, respondent.

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Order, Supreme Court, Bronx County (Barry Salman, J.), entered December 19, 2012, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Sandra Paucar alleges that she slipped and fell on a patch of clear ice located on the driveway of a house owned by defendants Patrice and Maria Solaro, for whom she worked. The snow had been last plowed by defendant Doerr, pursuant to a verbal agreement with the Solaros, more than one week earlier.

Defendants established their entitlement to judgment as a matter of law by submitting, inter alia, plaintiff's testimony

that she had not seen any icy condition on the driveway prior to her fall, including earlier that day, and Maria Solaro's testimony that she did not observe an icy condition when she left the house that morning (see *Roman v Met-Paca II Assoc., L.P.*, 85 AD3d 509 [1st Dept 2011]; *Simmons v Metropolitan Life Ins. Co.*, 207 AD2d 290, 291 [1st Dept 1994], *affd* 84 NY2d 972 [1994]). Additionally, defendant Doerr established that he did not create the alleged condition and owed plaintiffs no duty (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]).

In opposition, plaintiffs failed to raise a triable issue of fact as her affidavit directly contradicted her earlier testimony (see *Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]). Plaintiff's new theory, that the snow removal contractor's method of piling snow in mounds, which then melted and caused water to run down the sloped driveway, creating the subject condition, which was a recurring condition, is unpreserved (see *Fernandez v Riverdale Terrace*, 63 AD3d 555 [1st

Dept 2009])). In any event, the contention that the snow removal methods created a recurring condition is speculative, unsupported by the evidence or by climatological records, and contrary to the testimony which established a lack of any prior ice condition.

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

ENTERED: NOVEMBER 26, 2013

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CLERK



owners of artworks consigned to the gallery. The evidence established both that defendant participated in a unitary scheme to defraud the victims, which included closely related acts of nondisclosure and active misrepresentation, and that the gallery's owner, with whom defendant acted in concert, obtained property as a result of that scheme (see Penal Law § 190.65[2]; *People v First Meridian*, 86 NY2d 608 [1995]). We have considered and rejected defendant's arguments concerning these issues.

The court properly determined the restitution amount without holding a hearing pursuant to CPL 60.27. Defendant's request for such a hearing was only connected to her argument that restitution should be determined based on her personal financial gain, which she believed to be somewhere between \$150,000 and \$300,000 but had been unable to precisely fix the amount. Once the court decided that it would base restitution on the victims' actual losses, there was no factual challenge to the People's calculation based on the amounts invoiced for the art works. The calculation was based on evidence already in the trial record.

(*People v Consolvo*, 89 NY2d 140, 144 [1996]). The court, exercising its discretion based on consideration of all of the circumstances, then imposed a restitution amount that was less than a fourth of the People's calculation of loss.

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

ENTERED: NOVEMBER 26, 2013

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11171 Taofik Ifafore, Index 17962/07  
Plaintiff-Respondent-Appellant,

-against-

Chris Lebron,  
Defendant-Appellant-Respondent,

Jetro Cash and Carry Enterprises, LLC,  
Defendant.

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Law Office of Karen L. Lawrence, Tarrytown (David Holmes of  
counsel), for appellant-respondent.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for  
respondent-appellant.

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Order, Supreme Court, Bronx County (Barry Salman, J.),  
entered March 12, 2012, which granted so much of defendant Chris  
Lebron's motion as sought to amend his answer to include an  
affirmative defense based on Worker's Compensation Law §§ 11 and  
29(6), and denied so much of the motion as sought to dismiss the  
complaint, unanimously affirmed, without costs.

The record establishes that defendant Lebron's vehicle  
struck plaintiff, a fellow employee of Coca-Cola Company, as  
Lebron arrived for work, at a predawn hour, pulled into a parking  
facility owned by a third party, and turned left towards an area  
used by Coca-Cola employees. Plaintiff was walking inside the

lot, 15 or 20 feet from the entrance, having exited one building in which Coca-Cola had offices and heading east across the parking lot to reach another building in which Coca-Cola had offices. The record also indicates that the area of the parking lot in question lacked artificial illumination and was dark at the time of the accident.

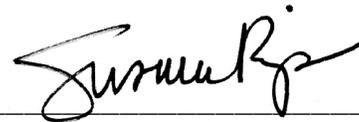
Whether Lebron was acting within the scope of his employment at the time of the accident cannot be determined on this record. Issues of fact exist whether the area of the parking lot where the accident took place constitutes plaintiff's sole route from the building at the east side of the lot to the building at the west side of the lot, whether that area constitutes Lebron's sole route to reach his designated parking area, and whether the lack of lighting in that area creates a special hazard for Coca-Cola employees, as distinguished from the general public, since the parking lot separates the buildings in which they regularly work, and during certain times of the year, employees working certain shifts are required to arrive before dawn (see *Ortiz v Lynch*, 105

AD3d 584 [1st Dept 2013]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: NOVEMBER 26, 2013

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK



Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11173N David Scirica, et al., Index 651699/11  
Plaintiffs-Appellants,

-against-

Ciro Colantonio, et al.,  
Defendants-Respondents.

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Law Offices of Edward Weissman, New York (Edward Weissman of  
counsel), for appellants.

Law Offices of Thaniel Beinert, Brooklyn (Jason McCumber of  
counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer,  
J.), entered April 4, 2013, which, to the extent appealed from as  
limited by the briefs, granted defendants' motion to vacate  
orders of the same court and Justice, entered December 7, 2012  
and March 6, 2013, dismissing defendants' counterclaims and  
granting plaintiffs' motion to strike defendants' answer based on  
defendants' failure to appear at a compliance conference  
scheduled for December 6, 2012, unanimously affirmed, without  
costs.

The uncontested facts establish that defendants' counsel was  
disbarred during the pendency of this action, resulting in an  
automatic stay of the proceeding against defendants until thirty  
days after notice to appoint another attorney was served on them

(CPLR 321[c]; *Moray v Koven & Krause, Esqs.*, 15 NY3d 384, 388-389 [2010]). The court's order of October 25, 2012, directing defendants to appear with or by counsel on December 6, 2012, did not constitute "notice to appoint another attorney" within the meaning of CPLR 321(c), since it did not put defendants on notice that they were required to find new counsel. Accordingly, the statutory 30-day period never began to run and the automatic stay was in place when the December 6, 2012 conference was held, when the court dismissed defendants' counterclaims, and when it struck defendants answer. Thus, the court properly granted defendants' motion to vacate these orders. Contrary to plaintiffs' argument, no affidavit of merit was required by defendants (see *Moray*, 15 NY3d at 389).

Defendants' argument that the order denying their request to depose certain non-party witnesses is not properly before this Court since defendants did not appeal from the order (see CPLR 5515; *Hecht v City of New York*, 60 NY2d 57, 61-62 [1983]).

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

ENTERED: NOVEMBER 26, 2013



CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11174N-

Index 301747/09

11175N Barbara J. Ford,  
Plaintiff-Respondent,

-against-

Rector, et al.,  
Defendants-Appellants.

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Epstein Becker & Green, P.C., New York (Margaret C. Thering of counsel), for appellants.

Bonnaig & Associates, New York (Denise K. Bonnaig of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered July 6, 2012, which granted plaintiff's motion to compel production of an investigatory file, and order, same court and Justice, entered February 19, 2013, which, upon renewal and reargument, adhered to the determination on the original motion, unanimously affirmed, without costs.

Plaintiff, who worked for the institutional defendants (Trinity) for nearly 20 years, alleges that starting in the summer of 2006 she was subjected to race and age discrimination by defendant Jennifer Campbell, Trinity's controller, and that Trinity did nothing to stop it, which caused her to file an internal complaint with the human resources department in May

2008. in July 2008, plaintiff filed a complaint with the New York State Division on Human Rights (SDHR), but withdrew it on January 30, 2009, for administrative convenience, so as to commence the instant action, on March 4, 2009. Plaintiff also alleges that Trinity, through Campbell's actions, retaliated against her for filing the internal and SDHR complaints by diminishing her workload and responsibilities.

In early January 2009, Trinity received anonymous faxes alleging scurrilous conduct on Campbell's part and alleging that Campbell was mistreating black and Hispanic employees. Trinity engaged a third-party investigation firm to uncover the source of the anonymous faxes, and over the course of several months, the investigation narrowed its focus to plaintiff, who was later accused of sending the faxes and was terminated on June 17, 2009, after defendants concluded that she was the culprit. Plaintiff amended her complaint to include the accusations and eventual termination as part of defendants' allegedly retaliatory conduct.

Because defendants cited plaintiff's purported act of sending or causing to be sent the anonymous faxes as the sole reason for the termination, plaintiff sought to compel discovery of the documents constituting the investigator's file, including communications between defendant's counsel and the investigators.

Defendants opposed on the grounds of the attorney-client relationship, attorney work product, and materials prepared in anticipation of litigation. After a two-year in camera inspection of the file, which exceeded 2,700 pages of documents, Supreme Court found that none of the privileges were applicable.

We perceive no basis for disturbing the court's findings (see *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]).

The court first noted that the documents revealed that Trinity's attorneys were assisting Trinity with its internal business operations by retaining the third-party investigation firm to uncover the source of the faxes, but also included summaries of the facts gathered by the investigator. Moreover, while certain status updates were relayed by the attorneys, there was no indication that they dispensed any legal advice to their clients based upon the investigation's findings. Hence, the court concluded that the attorney-client relationship was not implicated because, when viewed in their "full content and context," the documents did not contain any legal analysis or legal opinions or communications between Trinity and its counsel that were "primarily or predominantly of a legal character" (see *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-379 [1991]).

The court found that the attorney work product privilege did not apply because the documents did not indicate that an attorney had conducted any legal research or analysis or rendered any legal opinion about the client's legal position (see *Matter of New York City Asbestos Litig.*, 109 AD3d 7, 12 [1st Dept 2013]).

As to the privilege for materials prepared in anticipation of litigation (see CPLR 3101[d][2]), although defendants assert that they suspected plaintiff initially, the evidence in the record is equivocal on that point, and Trinity's director of human resources testified that the sole reason for launching the investigation was to uncover the source of the fax. Moreover, although defendants claim that they were already in "litigation mode" because plaintiff's SDHR complaint was still pending when the faxes were first received, they do not explain how uncovering the source of the January 2009 faxes would aid in defending against the race and age discrimination claims asserted in the SDHR complaint, which was filed in July 2008, based on conduct that occurred during the preceding two years. In addition, in letters to the court in connection with the submission of the documents for the in camera inspection, defendants' counsel indicated that Trinity retained the investigation firm only to identify the faxes' origin, and not to investigate plaintiff, and

that the documents were not generated to provide a defense to plaintiff's retaliation claim. Thus, the court properly concluded that the primary purpose of investigating the source of the faxes was employee discipline, and that this task was related to business judgment, rather than any legal strategy related to the then pending SDHR complaint.

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

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

ENTERED: NOVEMBER 26, 2013

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CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, Gische, JJ.

11176N	In re New York City Asbestos Litigation, - - - - - Ester Baruch, et al., Plaintiffs,	Index 190468/12 190315/12 190367/12
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-against-

Baxter Healthcare Corporation, et al.,  
Defendants,  
- - - - -

Karl Fersch, et al.,  
Plaintiffs-Respondents,

-against-

Amchem Products Inc., et al.,  
Defendants,

Volkswagen Group of America, Inc.,  
Defendant-Appellant.  
- - - - -

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondents.

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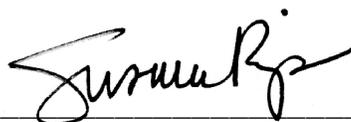
Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 22, 2013, which, to the extent appealed from, granted plaintiffs' motion pursuant to CPLR 602 to consolidate to the extent of consolidating the cases of Juni, Fersch and Middleton for trial, unanimously affirmed, without costs.

Given that all three plaintiffs were exposed to asbestos

products for vehicles in their work as mechanics over a substantially overlapping period of 40 years, and each is represented by the same counsel, and each case is trial ready, it cannot be said that the IAS court abused its discretion in ordering the three cases consolidated for trial (see *Malcolm v National Gypsum Co.*, 995 F2d 346, 350-352 [2d Cir 1993]). While there are some differences, including that one plaintiff has mesothelioma while the other two have lung cancer, and other differences pointed out by defendant, this does not outweigh the substantial overlap of factual and legal issues, or suggest the prejudice of defendant's right to a fair trial (see *Matter of New York City Asbestos Litig.*, 2011 NY Slip Op 31210[U], \*\*5-7 [Sup Ct, NY County 2011]).

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

ENTERED: NOVEMBER 26, 2013

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(*People v Mack*, 102 AD3d 438 [1st Dept 2013], *lv denied* 21 NY3d 945 [2013]). To the extent defendant is raising any arguments not raised by the codefendant, we find them unavailing. The evidence clearly established that the victim was in physical contact with the property, in that, as we have already observed, defendant "took a backpack that was leaning against the victim" (*id.*).

Defendant's challenge to police testimony regarding "lush workers" is likewise unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the court properly exercised its discretion in admitting limited, nonprejudicial background testimony about the pickpocketing methods of "lush workers" who target sleeping victims on trains and in train stations (*see e.g. People v Perez*, 16 AD3d 191 [1st Dept 2005], *lv denied* 4 NY3d 855 [2005]; *People v Right*, 180 AD2d 430 [1st Dept 1992], *lv denied* 79 NY2d 952 [1992]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 26, 2013



CLERK

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

11178 In re Johnny H.,

A Person Alleged to  
be a Juvenile Delinquent,  
Appellant.

- - - - -

Presentment Agency

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Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Michael J.  
Pastor of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E.  
Bednar, J.), entered on or about January 25, 2013, 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 assault in the first degree  
and criminal possession of a weapon in the fourth degree, and  
placed him with the Office of Children and Family Services for a  
period of 18 months, unanimously affirmed, without costs.

The court properly denied suppression of appellant's  
statement to the police. There is no basis for disturbing the  
court's credibility determinations. The record establishes that  
appellant was not questioned until after the police gave *Miranda*  
warnings to both appellant and his mother, that the police

complied with the requirements of Family Court Act § 305.2(7), and that the statement was voluntary (see *Matter of Jimmy D.*, 15 NY3d 417 [2010]).

The court properly denied appellant's motion to suppress identification evidence. There was nothing suggestive about the police photo array. We find no basis for suppression in the fact that there may have been a civilian-arranged single-photo identification, made prior to the police procedure and without any police involvement (see *Perry v New Hampshire*, \_\_US\_\_, 132 S Ct 716 [2012], *People v Marte*, 12 NY3d 583, 587 [2009], cert denied 559 US 941 [2010]). In any event, the identification was reliable and the court's findings of independent source are also supported by the record. Appellant's assertion that the victim did not see who stabbed him is meritless because immediately after the stabbing, the victim turned and saw appellant wielding a knife and being restrained by other persons.

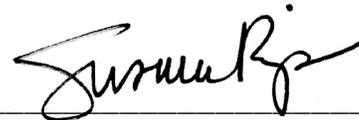
The court's fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence included both reliable identification testimony and appellant's voluntary confession.

The placement was a proper exercise of the court's

discretion that constituted the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (see *Matter of Katherine W.*, 62 NY2d 947 [1984]), particularly in light of the extreme seriousness of appellant's attack on the victim.

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

ENTERED: NOVEMBER 26, 2013

A handwritten signature in black ink, appearing to read "Susan R.", is written over a horizontal line.

CLERK

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

11179 Michael Kennis,  
Plaintiff-Appellant,

Index 113467/10

-against-

Steven J. Meleco,  
Defendant-Respondent.

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for  
appellant.

A. Daniel Murphy, New York, for respondent.

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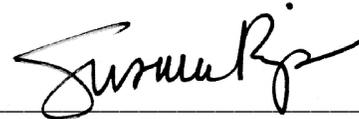
Order, Supreme Court, New York County (Richard F. Braun,  
J.), entered January 23, 2012, which granted defendant's motion  
to dismiss the complaint for lack of personal jurisdiction, and  
denied plaintiff's request for an extension of time to serve  
defendant pursuant to CPLR 306-b, unanimously affirmed, without  
costs.

The record shows that the process server attempted to  
effectuate service at defendant's address pursuant to CPLR 308(1)

and (2) (see *Farias v Simon*, 73 AD3d 569 [1st Dept 2010]). Under the circumstances presented, plaintiff's conduct did not satisfy the due diligence requirement of CPLR 308(4) (cf. *Hochhauser v Bungeroth*, 179 AD2d 431 [1st Dept 1992]).

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

ENTERED: NOVEMBER 26, 2013

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

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

11181 Antonio Pineda, Index 308354/08  
Plaintiff-Appellant, 300950/09

-against-

Wesley Werner Moore, et al.,  
Defendants-Respondents.

- - - - -

Juton Robinson,  
Plaintiff,

-against-

Moore Truckin, et al.,  
Defendants.

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Mitchell Dranow, Sea Cliff, for appellant.

Epstein Gialleonardo & Rayhill, Elmsford (David M. Heller of  
counsel), for respondents.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.),  
entered May 4, 2012, which, to the extent appealed from as  
limited by the briefs, granted defendants Wesley Werner Moore &  
Truckin Moore's cross motion for summary judgment dismissing  
plaintiff's complaint, unanimously reversed, on the law, without  
costs, and the motion denied.

Defendants failed to establish their entitlement to judgment  
as a matter of law. One of defendants' examining physicians  
found limited ranges of motion in plaintiff's lumbar spine

raising a triable issue of fact on the issue of whether plaintiff suffered a serious injury within the meaning of Insurance Law § 5102(d) (see *Chakrani v Beck Cab Corp.*, 82 AD3d 436 [1st Dept 2011]). Defendants also failed to meet their burden of showing that plaintiff's injuries are not causally related to the accident. They submitted insufficient evidence in support of their claim that the injuries are degenerative or were caused by a subsequent accident (see *Bray v Rosas*, 29 AD3d 422, 423-424 [1st Dept 2006]; *Jean-Baptiste v Tobias*, 88 AD3d 962 [2nd Dept 2011]). Furthermore, even assuming that defendants met their initial burden, plaintiff's submissions are sufficient to defeat the motion (see *Frias v James*, 69 AD3d 466 [1st Dept 2010]; *Bray v Rosas*, 29 AD3d at 424).

Finally, we note that the motion court properly dismissed plaintiff's 90/180-day claims, which, in any event, plaintiff has abandoned on appeal (see *McHale v Anthony*, 41 AD3d 265, 266-267 [1st Dept 2007]).

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

ENTERED: NOVEMBER 26, 2013



CLERK

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

11182 Gregorio Lucero,  
Plaintiff-Appellant,

Index 7487/06

-against-

DRK, LLC, et al.  
Defendants-Respondents.

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Gorayeb & Associates, P.C., New York (John M. Shaw of counsel),  
for appellant.

Zisholtz & Zisholtz, LLP, Mineola (Stuart S. Zisholtz of  
counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.),  
entered on or about August 29, 2012, which, insofar as appealed  
from as limited by the briefs, granted defendant New York City  
Industrial Development Agency's (IDA) motion for summary judgment  
dismissing the complaint as against it, and denied plaintiff's  
cross motion for partial summary judgment on the issue of  
liability, unanimously affirmed, without costs.

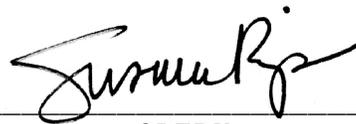
Supreme Court properly dismissed the complaint as against  
defendant IDA. Plaintiff correctly argues that IDA owned the  
premises at the time of plaintiff's accident, and that the ramp  
that collapsed constituted the type of structural defect for  
which constructive notice could be imposed upon the out-of-  
possession landowner. However, absent a contractual obligation

to repair/maintain the premises, or the right to reenter it to make repairs at the tenant's expense, IDA may not be charged with constructive notice of that structural defect (see *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 566-567 [1987]; *Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996]). Under this lease, not only was IDA not obligated to make repairs or maintain the premises, nor the right reserved by IDA to reenter to make such repairs at the tenant's expense, but the lease clearly and expressly disavowed any such obligations.

We have considered the parties' remaining contentions, and find them unavailing.

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

ENTERED: NOVEMBER 26, 2013



CLERK

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

11183           Zohar CDO 2003-1 Limited, et al.,           Index 651473/11  
                  Plaintiffs-Appellants,

-against-

Xinhua Sports & Entertainment  
Limited, et al.,  
Defendants,

Loretta Fredy Bush,  
Defendant-Respondent.

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Shapiro, Arato & Isserles LLP, New York (Marc E. Isserles of  
counsel), for appellants.

Drinker Biddle & Reath LLP, New York (Clay J. Pierce of counsel),  
for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos,  
J.), entered August 24, 2012, which granted the motion of  
defendant Loretta Fredy Bush to dismiss the second cause of  
action alleging negligent misrepresentation as against her,  
unanimously affirmed, with costs.

Where, as here, sophisticated parties expressly state in  
their heavily negotiated agreement that they are dealing at  
arm's-length, such a disclaimer bars a claim for negligent  
misrepresentation, because it precludes a finding of a special  
relationship (*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 208-209  
[1st Dept 2012]); *AJW Partners LLC v Itronics Inc.*, 68 AD3d 567,

568 [1st Dept 2009]). In addition, the complaint failed to allege facts giving rise to a special relationship. That defendant had superior knowledge of her company's business and finances is not the type of special knowledge or expertise that will support this claim (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296-297 [1st Dept 2011]). Nor do the past dealings of plaintiffs' collateral manager with defendant, all in arm's-length transactions, create a special relationship.

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

ENTERED: NOVEMBER 26, 2013

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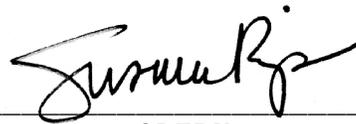
NY2d 745 [1989]; *People v Mintz*, 20 NY2d 753, 770 [1967])).

**M-5661 - *People v Sostre***

Motion seeking to abate appeal due to death granted.

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

ENTERED: NOVEMBER 26, 2013

A handwritten signature in black ink, appearing to read "Susan R. Jones", is written over a horizontal line.

CLERK

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

11185 Honua Fifth Avenue LLC, Index 652237/10  
Plaintiff-Appellant,

-against-

400 Fifth Realty LLC, et al.,  
Defendants-Respondents.

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Brown Rudnick LLP, New York (Sigmund S. Wissner-Gross of  
counsel), for appellant.

Greenberg Traurig LLP, New York (Steven Sinatra of counsel), for  
400 Fifth Realty LLC, respondent.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Marc L.  
Greenwald of counsel), for Unicredit S.P.A., respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.),  
entered May 24, 2013, which, insofar as appealed from as limited  
by the briefs, denied plaintiff's motion to amend the complaint  
to add claims of fraudulent inducement and aiding and abetting  
fraud, and applied a 0.18% interest rate rather than the  
statutory 9% rate in calculating the undertaking to be posted by  
defendant 400 Fifth Realty LLC to cancel the notice of pendency,  
unanimously affirmed, with costs.

While the proposed amended complaint alleges a  
misrepresentation, its allegations of fraudulent intent are  
conclusory and lacking in details sufficient to support the claim

for fraudulent inducement (see CPLR 3016[b]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559-560 [2009]).

Plaintiff also fails to sufficiently allege injury caused by the alleged fraud. It cannot allege injury because the undertaking to be posted by defendant 400 Fifth adequately secures it from the loss of its \$45 million deposit (see *New York City Tr. Auth. v Morris J. Eisen, P.C.*, 276 AD2d 78, 85 [1st Dept 2000] ["a cause of action for fraud cannot accrue until every element of the claim, including injury, can truthfully be alleged"]).

Plaintiff's assertion that it made material concessions during the negotiation of the terms of the Third Amended Agreement in reliance on 400 Fifth's representation that it had invested \$100 million of equity in the project is insufficient to plead injury because the alleged loss is speculative (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 422 [1996]). Absent a predicate claim for fraud, plaintiff's claim of aiding and abetting fraud also fails (*Vilar v Rutledge*, 106 AD3d 489, 490 [1st Dept 2013]).

Because this action to foreclose on the vendee's lien is equitable in nature (see *Elterman v Hyman*, 192 NY 113, 125-126 [1908]), plaintiff is not entitled as of right to the 9% statutory interest rate in the calculation of 400 Fifth's undertaking (see CPLR 5001[a]; 5004; 6515[1]). The equitable

vendee's lien extended only to the \$45 million that plaintiff had advanced towards that purchase money (see *Elterman*, 192 NY at 125). To the extent the initial agreement provided for the crediting of interest to the purchase price of the property, and therefore to the lien (see *Royle Realty Co. v Juhring*, 21 AD2d 911 [2d Dept 1964], *affd* 16 NY2d 566 [1965]), the Third Amended Agreement, which is the governing contract, does not provide for interest or credits to the purchase price aside from the \$45 million that plaintiff paid.

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

ENTERED: NOVEMBER 26, 2013

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

11188 Bernard Verdon, et al., Index 309654/09  
Plaintiffs-Respondents, 84113/10  
83879/11

-against-

Port Authority of New York  
and New Jersey, et al.,  
Defendants-Appellants,

Bovis Lend Lease, et al.,  
Defendants.

- - - - -

The Port Authority of New York  
and New Jersey, et al.,  
Third-Party Plaintiffs-Respondents,

Bovis Lend Lease, et al.,  
Third-Party Plaintiffs,

-against-

U.S. Lumber, Inc., et al.,  
Third-Party Defendants-Appellants.

- - - - -

The Port Authority of New York  
and New Jersey, et al.,  
Second Third-Party Plaintiffs-Respondents,

Bovis Lend Lease, et al.,  
Second Third-Party Plaintiffs,

-against-

Louis J. Grasmick Lumber Company, Inc.,  
Second Third-Party Defendant-Appellant.

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Segal McCambridge Singer & Mahoney, Ltd., New York (Simon Lee of  
counsel), for The Port Authority of New York and New Jersey and  
Tishman Construction Corporation of New York,  
appellants/respondents.

Jacobson & Schwartz, LLP, Jericho (Paul Goodovitch of counsel), for U.S. Lumber, Inc., appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for Feldman Lumber Industries, Inc., appellant.

Schenck, Price, Smith & King, LLP, New York (John P. Campbell of counsel), for Louis J. Grasmick Lumber Company, Inc., appellant.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for Bernard and Mary Verdon, respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered January 22, 2013, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim, denied third-party defendants' and second third-party defendant's motions for summary judgment dismissing the third-party and second third-party complaints, unanimously modified, on the law, to grant third-party defendants' and second third-party defendant's motions, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the third-party and second third-party complaints.

Plaintiff testified that he was injured when the guardrail on the trailing platform on which he was working broke and he fell 14 feet and landed on rebar. This evidence establishes prima facie a violation of Labor Law § 240(1), since the

protective device, i.e., the guardrail, “‘proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person’” (see *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009] [emphasis deleted], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Plaintiff was not required to prove that the guardrail was defective (see *Hamill v Mutual of Am. Inv. Corp.*, 79 AD3d 478, 479 [1st Dept 2010]).

Contrary to defendants’ contention, the fact that plaintiff’s accident was unwitnessed presents no bar to summary judgment in his favor (see e.g. *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 410 [1st Dept 2013]). The evidence in the record is sufficient to permit the conclusion that plaintiff fell from an elevated position (cf. *Manna v New York City Hous. Auth.*, 215 AD2d 335 [1st Dept 1995] [summary judgment denied to plaintiff, sole witness to accident, who testified that falling cinder block cut his head, where no broken pieces of cinder block were found at the scene], *lv denied* 87 NY2d 801 [1995]).

We reject defendants’ argument that the independent intervening act of the contact between the skip box and the mid-rail was a superseding cause that relieves them of liability (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]). It was

foreseeable that the skip box would strike the wooden mid-rail as it was hoisted by a crane and moved on and off the trailing platform (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]; *see Harris v 170 E. End Ave., LLC*, 71 AD3d 408 [1st Dept 2010], *lv dismissed* 15 NY3d 911 [2010]).

Third-party and second third-party defendants (the lumber suppliers) showed that the circumstantial evidence through which defendants sought to prove the identity of the supplier of the lumber used to construct the guardrail was insufficient to establish a "reasonable probability" that one of them was the supplier (*see Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 603 [1996]). The evidence establishes that the lumber received at the construction site from each of the lumber suppliers was not stored separately and that the lumber used to build the guardrails on the trailing platform was taken from stockpiles of lumber that were not designated by the supplier. Moreover, while certain markings on the broken lumber would have made identification of the particular supplier possible, defendants apparently discarded the broken lumber before the suppliers were able to inspect it, and the photographs taken of the broken lumber immediately after the accident do not reveal discernible markings. Defendants failed to raise an issue of fact in

opposition, since their evidence establishes only that the 2 x 4 lumber used at the construction site was obtained from all three lumber suppliers.

U.S. Lumber's fact-based argument that defendants should be sanctioned for failing to preserve the lumber so the parties could inspect it is unpreserved (see *Ervin v Consolidated Edison of N.Y.*, 93 AD3d 485 [1st Dept 2012]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: NOVEMBER 26, 2013

  
CLERK





open the hood of the car, reach into the engine area and return to the car without the bag. Based on those observations, the police had reasonable suspicion that defendant had engaged in criminal activity, most likely a drug transaction (see e.g. *People v Garcia*, 96 AD3d 481 [1st Dept 2012], *lv denied* 19 NY3d 1025 [2012]). In particular, it was highly suspicious for defendant to apparently secrete a bag under the hood of the car. This behavior was inconsistent with innocent explanations, such as repairing the car. Accordingly, the police conducted a lawful stop for the purpose of investigating criminal activity, and they properly detained and questioned defendant and the passenger.

From outside the car, an officer saw a large pill bottle on the passenger's lap. When the passenger tried to hide the bottle, the officer reached into the car and grabbed the bottle. For the first time on appeal, defendant asserts that the officer had no right to seize the bottle, and that subsequent questioning was the fruit of that seizure. Although there was some discussion of the seizure of the bottle in the court's decision, the court did not "expressly decide[ ]" the issue "in response 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 [1st Dept 2007]). Accordingly, this issue is unpreserved and we decline to

review it in the interest of justice.

As an alternative holding, we find that, in addition to being a very limited intrusion, the seizure of the bottle was permissible under the automobile exception because, at that point, the police had probable cause to believe that the car contained evidence of an illicit drug exchange, and were thus authorized to conduct a warrantless search of the car and any containers it contained (*see generally People v Yancy*, 86 NY2d 239, 245-246 [1995]). When the passenger tried to hide the pill bottle, his actions indicated that the bottle was incriminating. When this display of consciousness of guilt was added to the behavior by defendant and the passenger already observed by the police, it became obvious that there had just been an illicit transaction involving prescription medication, thereby creating probable cause (*see e.g. People v O'Kane*, 55 AD3d 315 [1st Dept 2008], *lv denied* 11 NY3d 928 [2009]).

Contrary to defendant's argument, the hearing court made no express or implied finding that the level of suspicion had not yet ripened into probable cause at the point when the bottle was seized. Any lack of clarity in the record, in the People's position at the hearing, or in the ruling the court delivered orally immediately after the hearing, can be attributed to

defendant's failure to litigate the particular issue (see *People v Calderon*, 92 AD3d 606 [1st Dept 2012], *lv denied* 19 NY3d 958 [2012])).

As noted, the police did not immediately search the car, but only conducted a limited intrusion by picking up the bottle and examining the label. The officer saw that the pills had been dispensed that day, but that the bottle was empty. Upon further questioning, defendant and the passenger gave evasive or incredible answers that confirmed police suspicion that defendant had unlawfully obtained prescription medication from the passenger and secreted it under the hood, and provided further support for a search under the automobile exception. We note that, regardless of the legality of the seizure of the pill bottle, some of the questions posed to defendant and the passenger had nothing to do with the bottle, and the responses to those questions, standing alone, raised the level of suspicion to probable cause. In particular, defendant told the officer that he had not put anything under the hood, which was contrary to the officer's own observations.

Since nothing in the trial court's supplemental jury instructions can be viewed as expressly shifting the burden of proof, normal preservation requirements apply (see *People v*

*Thomas*, 50 NY2d 467, 471-472 [1980]). We conclude that defendant did not preserve his present argument (see *People v Whalen*, 59 NY2d 273, 280 [1983]), and we decline to review it in the interest of justice. As an alternative holding, we find that an errant phrase in the supplemental charge could not have misled the jury as to the burden of proof (see *People v Umali*, 10 NY3d 417, 426-427 [2008]).

The portion of the prosecutor's summation to which defendant objected as speculation was a permissible record-based argument. Defendant's remaining challenges to the prosecutor's summation and the court's supplemental instructions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: NOVEMBER 26, 2013

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

11195N Edward Mulqueen, Index 306351/12  
Plaintiff-Respondent,

-against-

Christopher Live, et al.,  
Defendants-Appellants.

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Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of  
counsel), for appellants.

Napoli Bern Ripka Shkolnik, LLP, New York (Denise A. Rubin of  
counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-  
Hughes, J.), entered January 14, 2013, which denied defendants'  
motion to change venue from Bronx County to Westchester County,  
unanimously affirmed, without costs.

Plaintiff was injured in a motor vehicle accident that  
occurred in Bronx County. He designated venue in Bronx County,  
based on the actual principal place of business of the corporate  
defendant, Down East Seafood. While designation of venue in the  
county in which a corporate defendant's principal place of  
business is located is proper (*see Margolis v United Parcel  
Serv., Inc.*, 57 AD3d 371 [1st Dept 2008]), it has been held that,  
for venue purposes, the corporation's designation of a county as  
the location of its principal office in its certificate of

incorporation is controlling (see *Krochta v On Time Delivery Serv., Inc.*, 62 AD3d 579 [1st Dept 2009]; *Conway v Gateway Assoc.*, 166 AD2d 388 [1st Dept 1990]).

Here, in support of their motion to change venue, defendants failed to submit a copy of Down East's certificate of incorporation, and submitted a print-out of information on file with the New York State Department of State, which supports plaintiff's allegation that its principal executive offices are located in Bronx County. Defendants could not "remedy a fundamental deficiency in the moving papers by submitting evidentiary material with the reply" (*TrizecHahn, Inc. v Timbil Chiller Maintenance Corp.*, 92 AD3d 409, 410 [1st Dept 2012] [internal quotation marks omitted]; see *Doyaga v Camelot Taxi Inc.*, 102 AD3d 594, 595 [1st Dept 2013]).

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

ENTERED: NOVEMBER 26, 2013



CLERK

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

11196N Board of Managers of Central Index 118205/09  
Park Place Condominium,  
Plaintiff-Appellant,

-against-

Hubert Potoschnig, etc.,  
Defendant-Respondent,

American Express Centurion, et al.,  
Defendants.

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Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of  
counsel), for appellant.

Hubert Potoschnig, respondent pro se.

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Order, Supreme Court, New York County (Judith J. Gische,  
J.), entered September 6, 2012, which, insofar as appealed from,  
denied plaintiff's motion for summary judgment on its claim  
against defendant Potoschnig for late fees, interest, and  
attorneys' fees, unanimously reversed, on the law, with costs,  
the motion granted, and the matter remanded for the appointment  
of a referee to compute the amount of unpaid common charges and  
assessments, late fees, and interest due to plaintiff from  
Potoschnig, and to determine the amount of plaintiff's reasonable  
attorneys' fees.

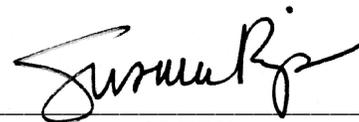
Plaintiff's entitlement to unpaid common charges brings with

it a right to late fees, interest, and attorneys' fees, all of which are provided for in the condominium by-laws. Defendant has not raised an inference that the late fees and interest, which, in accordance with the by-laws, were imposed only upon default, were usurious (*see Miller Planning Corp. v Wells*, 253 AD2d 859, 860 [2d Dept 1998]). Defendant's challenges to the amounts due may be addressed by a referee, pursuant to RPAPL 1321 (*see 1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567 [1st Dept 2013]). The referee should also determine the amount of plaintiff's reasonable attorneys' fees (*see CPLR 4311*).

We do not address the applicability of RPAPL 1303 and 1320 since plaintiff is not seeking foreclosure relief by this appeal.

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

ENTERED: NOVEMBER 26, 2013

A handwritten signature in black ink, appearing to read 'Susan R.', is written over a horizontal line.

CLERK



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman,	J.P.
Karla Moskowitz	
Rosalyn H. Richter	
Sallie Manzanet-Daniels	
Judith J. Gische,	JJ.

10626  
Index 106268/11

x

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In re Lillian Roberts, etc., et al.,  
Petitioners-Appellants,

-against-

New York City Office of  
Collective Bargaining, et al.,  
Respondents-Respondents.

x

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Petitioners appeal from a judgment of the Supreme Court,  
New York County (Robert E. Torres, J.),  
entered April 30, 2012, denying the petition  
seeking an annulment of respondent Board of  
Collective Bargaining's determination, dated  
April 28, 2011, that respondent Fire  
Department of the City of New York's "zero  
tolerance" policy requiring automatic  
termination of certain emergency medical  
services employees who fail or refuse to  
provide a specimen for a drug test was not  
subject to mandatory collective bargaining,

and dismissing the proceeding brought pursuant to CPLR article 78.

Mary J. O'Connell, New York (Steven E. Sykes of counsel), for appellants.

John F. Wirenius, and Michael T. Fois, New York, for The New York City Office of Collective Bargaining, Board of Collective Bargaining and Marlene Gold, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Benjamin Welikson, Leonard Koerner and Paul T. Rephen of counsel), for the City of New York, Mayor's Office of Labor Relations and the Fire Department of the City of New York, respondents.

RICHTER, J.

This appeal raises the question of whether the New York City Fire Department's "zero tolerance" policy, requiring automatic termination of certain emergency medical services [EMS] employees who fail or refuse to provide a specimen for a drug test, should have been subject to mandatory collective bargaining. The New York City Board of Collective Bargaining found that this issue was not required to be bargained, and unions representing the employees brought this article 78 proceeding. We now uphold the Board's decision because the City Charter provides that the discipline of these EMS employees is the sole province of the New York City Fire Commissioner, and because the Fire Department's determination of an appropriate penalty for illegal drug use relates to its primary mission of providing public safety.

In 1996, respondent Fire Department of the City of New York (FDNY) took over EMS functions from the New York City Health and Hospitals Corporation, and became the municipal provider of pre-hospital emergency medical treatment and transport for City's 911 system. EMS personnel include paramedics and emergency medical technicians (EMTs) who respond to 911 calls, provide initial emergency medical assistance to sick or injured persons, and safely transport them to the hospital.

In June 1999, FDNY issued a written policy setting forth procedures for testing EMTs and paramedics (hereinafter EMS workers) suspected of being under the influence of intoxicating substances while on duty (the 1999 policy). The 1999 policy did not provide for any specific penalties for a positive drug test result, but merely stated that employees testing positive were to be served with appropriate departmental charges. Although the policy contained no penalty provisions, in practice, FDNY would not always terminate the employment of EMS workers who tested positive for drugs. Instead, some first-time offenders could avoid termination, in the discretion of FDNY on a case-by-case basis, if they sought counseling and treatment.

This practice changed in May 2007, when FDNY implemented a new alcohol and drug testing policy for EMS workers. The new policy imposes "zero tolerance" for illegal drug use, and provides that EMS workers who test positive for illegal drugs, or who refuse to provide a specimen, shall be terminated for a first offense (the termination provision). EMS workers with a drug problem who voluntarily come forward can avail themselves of counseling services without any disciplinary consequences.

Petitioners, who are union officials representing EMTs and paramedics, filed an improper practice petition alleging that

FDNY violated the New York City Collective Bargaining Law (NYCCBL) (Administrative Code of City of NY § 12-301 *et seq.*) by unilaterally implementing the termination provision without first bargaining in good faith with the unions (see NYCCBL 12-306[a][4]).<sup>1</sup> In their answer, FDNY and respondent City of New York maintained that the termination provision was not a substantive change in policy and, in any event, was not subject to mandatory collective bargaining. Respondent Board of Collective Bargaining (the Board) conducted a hearing at which petitioners and the City presented testimony and documentary evidence.

In a decision dated April 28, 2011, the Board denied petitioners' improper practice petition insofar as it challenged the termination provision.<sup>2</sup> The Board concluded that this provision constituted a change to the 1999 policy because it mandated termination upon a positive drug test or refusal to provide a specimen. The Board found that this deviated from the earlier policy, which allowed for some exercise of discretion in

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<sup>1</sup> The petition also challenged several other aspects of the 2007 policy, none of which are at issue in this appeal.

<sup>2</sup> Other aspects of the Board's decision are not the subject of this appeal.

deciding whether offenders should be offered alternative dispositions, including counseling and rehabilitation. Nevertheless, the Board concluded that the implementation of the termination provision was within management's right to take disciplinary action against its employees, and thus was outside the scope of mandatory bargaining. Petitioners brought this article 78 proceeding challenging the Board's decision. The City and the Board each moved to dismiss the proceeding, and in a decision entered April 30, 2012, the motion court granted the motions. This appeal ensued.

It is well-settled that New York's Taylor Law (Civil Service Law § 200 *et seq.*) requires collective bargaining over all terms and conditions of employment (*Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd.*, 19 NY3d 876, 879 [2012]). Local governments are permitted to enact their own procedures governing labor relations as long as they are substantially equivalent to those set forth in the Taylor Law (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 97 NY2d 378, 382 [2001]). In the City of New York, the NYCCBL regulates the conduct of labor relations between the City and its employees. Consistent with the Taylor Law, the NYCCBL requires public employers and certified or designated employee

organizations to bargain in good faith on wages, hours and working conditions (NYCCBL 12-307[a]).

There is no question that New York has a strong policy of supporting collective bargaining, and a presumption exists that all terms and conditions of employment are subject to mandatory bargaining (*Matter of Patrolmen's Benevolent Assn. of City of N.Y. Inc. v New York State Pub. Empl. Relations Bd.*, 6 NY3d 563, 571-572 [2006]). This presumption can be overcome, however, where there exists clear legislative intent to remove an issue from mandatory bargaining (*Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 NY2d 73, 79 [2000]). Indeed, "some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so" (*Matter of Patrolmen's Benevolent Assn.*, 6 NY3d at 572).

For example, the Court of Appeals has repeatedly held that the policy favoring strong disciplinary authority for those in charge of police forces prevails over the Taylor Law where legislation has expressly committed such discipline to local officials. In *Matter of Patrolmen's Benevolent Assn.*, the police union challenged a decision by the Public Employment Relations Board that the City was not required to bargain over a number of disciplinary subjects. The Court held that the disciplinary

matters at issue were a prohibited subject of collective bargaining because the Legislature had vested disciplinary authority over police officers with the Police Commissioner (6 NY3d at 576).

Specifically, the Court relied on section 434(a) of the New York City Charter, which provides that “[t]he [police] commissioner shall have cognizance and control of the . . . discipline of the department” (6 NY3d at 573-574).<sup>3</sup> The Court found that the Charter provision reflects a “powerful” policy favoring management authority over police discipline, “a policy so important that the policy favoring collective bargaining should give way” (*id.* at 576). Emphasizing the quasi-military nature of a police force, the Court concluded that questions of police discipline rest wholly in the discretion of the Police Commissioner (*id.*).

Several years later, in *Matter of City of New York v Patrolmen’s Benevolent Assn. of City of N.Y., Inc.* (14 NY3d 46 [2009]), the Court again relied on New York City Charter § 434(a)

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<sup>3</sup> The Court also cited Administrative Code § 14-115(a), which also governs police discipline. Although a similar provision covers fire department discipline (Administrative Code § 15-113), it is not clear whether that section applies to EMS workers or is limited to firefighters. Thus, respondents do not rely on that statute.

to conclude that the triggers and methodology for testing city police officers for drugs are matters within the Police Commissioner's disciplinary authority and thus excluded from collective bargaining as a matter of policy (14 NY3d at 58-59; see also *Matter of Town of Wallkill v Civil Serv. Empls. Assn., Inc. (Local 1000, AFSCME, AFL-CIO, Town of Wallkill Police Dept. Unit, Orange County Local 836)*, 19 NY3d 1066 [2012] [upholding local law setting forth disciplinary procedures for police officers different from those provided for in the collective bargaining agreement because statute vested police discipline with the town). The Court emphasized that deterring illegal drug use within the police department is a "crucial component of the Police Commissioner's responsibility to maintain discipline within the force" (14 NY3d at 59).

*Matter of Patrolmen's Benevolent Assn.* and *Matter of City of New York* mandate a conclusion that FDNY's implementation of a policy of terminating EMS workers after failing or refusing to take a drug test is not subject to collective bargaining. New York City Charter § 487(a) gives the Fire Commissioner the "sole and exclusive power" to "perform all duties for the government, discipline, management, maintenance and direction of the fire

department.”<sup>4</sup> There is no discernable difference between this Charter provision and the parallel Charter provision governing police discipline. In fact, section 487(a), which refers to “sole and exclusive power” over fire department discipline, is even more strongly worded than the section on police discipline, which refers to “cognizance and control” (see *Matter of Von Essen*, 4 NY3d at 223).

Moreover, the same policy concerns that guided the Court of Appeals’ decisions in *Matter of Patrolmen’s Benevolent Assn.*, and *Matter of City of New York* apply with equal force here. FDNY, like the police department, is a quasi-military organization (*Matter of Gallagher v City of New York*, 307 AD2d 76, 82 [1st Dept 2003], *lv denied* 1 NY3d 503 [2003]), demanding strict discipline of its workforce (see *Matter of Patrolmen’s Benevolent Assn.*, 6 NY3d at 576). And the policy of deterring illegal drug use by EMS workers is just as crucial as the policy of preventing police officers from using prohibited drugs (see *Matter of City of New York*, 14 NY3d at 59).

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<sup>4</sup> Like the Charter provision governing police discipline, section 487(a) predates the enactment of Civil Service Law §§ 75 and 76, and thus benefits from the grandfather provision of Civil Service Law § 76(4) (see *Matter of Von Essen v New York City Civ. Serv. Comm.*, 4 NY3d 220, 224 [2005]).

FDNY has a substantial and compelling interest in ensuring that workers responsible for the well-being and transportation of injured and sick citizens are free from the effects of illegal drugs.

The danger to patients, the public and other workers arising from EMS workers being under the influence of illegal drugs is amply supported by the record before the Board. The City presented expert testimony to support its conclusion that the use of illegal substances can substantially interfere with an EMS worker's ability to perform critical safety-sensitive tasks. Other City witnesses explained how paramedics and EMTs are responsible for making split-second decisions about medical care, often in life-or-death situations, and must be fully alert while performing their jobs. Moreover, it is critical to ensure that EMS workers, who are in close proximity to medications, including controlled substances, do not themselves use illegal substances. And the risk of driving an ambulance at high speeds while under the influence of drugs needs no elaboration.

We find no merit to the argument raised by both petitioners and the Board that the applicability of City Charter § 487(a) is unreserved (*cf. Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001] ["Judicial review of administrative

determinations pursuant to CPLR article 78 is limited to questions of law"). Although that particular statute was not cited at the administrative level, petitioners fully briefed the broader question of whether there exists statutory authority to remove FDNY's termination policy from the sphere of collective bargaining. And the Board's decision specifically cited to the Court of Appeals' decision in *Matter of City of New York*, which relies on an analogous Charter provision. Thus, the issue before us was fully preserved for our review (see *Blainey v Metro N. Commuter R.R.*, 99 AD3d 588, 590 [2012], *lv denied* 21 NY3d 859 [2013] [party's failure to cite a particular statute below does not preclude party from relying on that statute when arguing for the very same position on appeal]).

The Court of Appeals recently reiterated that a public employer cannot be compelled to bargain over "inherent[] and fundamental[] policy decisions relating to the primary mission of the public employer" (*Matter of New York City Tr. Auth.*, 19 NY3d at 879 [internal quotation marks omitted]; see also *Matter of County of Erie v State of N.Y. Pub. Empl. Relations Bd.*, 12 NY3d 72, 78 [2009]). FDNY's interest in ensuring that its EMS workers are drug-free directly relates to the primary mission of treating and providing transport for sick and injured citizens and

ensuring that EMS workers do so safely. This Court of Appeals precedent provides further support for our conclusion that FDNY cannot be compelled to bargain over this fundamental public safety policy decision.

Petitioners unpersuasively argue that bargaining over the disciplinary penalty here is required by NYCCBL 12-307(b). Under that provision, a public employer has the right to “take disciplinary action,” and decisions on those matters are management prerogatives that are not within the scope of collective bargaining. However, this provision also states that “questions concerning the practical impact that [such] decisions . . . have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining” (*id.*). In some cases, a particular matter may be both a management prerogative and also have an impact on a term or condition of employment, requiring a balancing of the interests involved (see *Matter of Levitt v Board of Collective Bargaining of City of N.Y., Off. of Collective Bargaining*, 79 NY2d 120, 127 [1992]).

To the extent the Board proposes that such a balancing test is appropriate here, we disagree. Because the determination of the appropriate penalty for drug use by EMS workers goes directly

to FDNY's core mission and involves public safety, and because specific legislation vests disciplinary authority over such matters with the Fire Commissioner, this issue is removed altogether from the sphere of collective bargaining (see *Matter of New York City Tr. Auth.*; *Matter of Town of Walkill*; *Matter of City of New York*; *Matter of County of Erie*; *Matter of Patrolmen's Benevolent Assn.*).

Even if the policy here were subject to a balancing test, FDNY's interest in ensuring its EMS workers are drug-free far outweighs any interest these employees may have in requiring that a different penalty structure be implemented. Petitioners argue that FDNY's policy interferes with EMS workers' procedural due process rights to have an administrative law judge or arbitrator determine the appropriate penalty. These employees' due process rights, however, are not abrogated completely by the challenged policy because they still are entitled to a hearing on any charges arising from drug testing, and to appeal any finding of guilt. Petitioners offer no other specific employee interests that would be subject to balancing. Indeed, it is their primary position that penalties for specific offenses must always be collectively bargained, a position that is at odds with both the City Charter and controlling Court of Appeals precedent.

Accordingly, the judgment of the Supreme Court, New York County (Robert E. Torres, J.), entered April 30, 2012, denying the petition to annul respondent Board of Collective Bargaining's determination, dated April 28, 2011, that respondent Fire Department of the City of New York's "zero tolerance" policy, requiring automatic termination of EMS workers who fail or refuse to provide a specimen for a drug test, was not subject to mandatory collective bargaining, and dismissing the proceeding brought pursuant to CPLR article 78, should be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 26, 2013

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK