SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 20, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15899 The People of the State of New York, Respondent, Ind. 232/11

-against-

Angel Alvarado,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

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Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered May 7, 2014, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's lack of prior offenses and his completion of sex offender treatment were adequately accounted for by the risk assessment instrument, and none of the mitigating factors

cited by defendant outweigh the seriousness of his crimes, which were committed against young teenagers. We have considered and rejected defendant's remaining claims.

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15900 Kofi Adu, Index 309912/12
Plaintiff-Appellant,

-against-

Lloyd Kirby, et al.,
Defendants-Respondents.

_____

Krentsel & Guzman, LLP, New York (Joshua Ram of counsel), for appellant.

Fogarty Duffy, P.C., Mineola (Garrett Duffy of counsel), for respondents.

_____

Order Supreme Court, Bronx County (Betty Owen Stinson, J.), entered August 4, 2014, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law 5102(d), unanimously modified, on the law, to deny the motion as to the claims of injury to the left shoulder, and otherwise affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain permanent consequential or significant limitations in the cervical spine, thoracolumbar spine, left knee, or left shoulder as a result of the subject motor vehicle accident by submitting an affirmed report by their medical expert, who determined, after examining plaintiff, that plaintiff had full range of motion,

negative clinical test results, and no neurological deficits (*see e.g. Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]; *Acosta v Zulu Servs., Inc.*, 129 AD3d 640, 640 [1st Dept 2015]).

In opposition, plaintiff failed to raise a triable issue of fact with respect to his cervical spine, thoracolumbar spine, and left knee, since he submitted no objective medical evidence to substantiate his claim that he suffered "permanent consequential" or "significant" limitations of use of those body parts (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350, 353 [2002]).

However, plaintiff raised a triable issue of fact as to a serious injury to his left shoulder by submitting affirmed reports by a diagnostic radiologist who opined that an MRI showed injuries to the shoulder, and by his orthopedic surgeon, who examined plaintiff on numerous occasions and found limitations in range of motion. The orthopedist's opinion as to causation and permanence, based on his examinations, coupled with the radiologist's MRI report that plaintiff sustained a partial thickness undersurface tear of the supraspinatus tendon, is sufficient to raise a triable issue of fact (*see Bonilla v Abdullah*, 90 AD3d 466 [1st Dept 2011], *lv dismissed* 19 NY3d 885 [2012]).

Defendants established prima facie that plaintiff did not

sustain a serious injury under the 90/180-day category by relying on plaintiff's bill of particulars, which did not include a 90/180-day claim, and his deposition testimony that he did not miss any work after the accident (*see Colon v Tavares*, 60 AD3d 419 [1st Dept 2009]; *Komina v Gil*, 107 AD3d 596 [1st Dept 2013]). Plaintiff's testimony that he was unable to jump rope, play soccer, and lift heavy baggage with his left hand failed to raise an issue of fact whether his claimed injuries prevented him from "performing substantially all of the material acts which constitute[d] [his] usual and customary daily activities" (Insurance Law § 5102[d]).

At trial, if plaintiff establishes a serious injury to his left shoulder, he may recover for all injuries causally related to the accident, even those that do not meet the serious injury threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15901 Ju Eun Jang, et al., Index 116650/09
Plaintiffs-Appellants,

-against-

All Mobile Video, Inc., et al.,
Defendants-Respondents.

_____

Sim & Park, LLP, New York (Andrew Park of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Lindsay J. Kalick of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 11, 2014, which denied plaintiffs' motion to vacate a judgment, same court (Silver, J.), entered March 15, 2013, upon default, dismissing the complaint, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, the motion granted, and the complaint reinstated.

We disagree with the motion court as to the reasonableness of plaintiffs' proffered excuse for failing to oppose defendants' motion for summary judgment (*see* CPLR 5015[a]); *Alliance Prop. Mgt. & Dev. v Andrews Ave. Equities*, 70 NY2d 831, 833 [1987] [this Court may substitute its own discretion for that of Supreme Court]). Plaintiffs' attorney affirmed that she only received the physician's narrative report, without which she could not

prepare opposition papers, until near the return date of the motion and that before that date she suffered a sudden illness and pain for which she had to be heavily sedated, and as a consequence she was unable to communicate with her office about seeking an adjournment (*see Santiago v Valentin*, 125 AD3d 459 [1st Dept 2015]; *Imperato v Mount Sinai Med. Ctr.*, 82 AD3d 414 [1st Dept 2011], *affd on other grounds* 18 NY3d 871 [2012]).

Plaintiffs also provided affirmed medical experts' reports demonstrating potentially meritorious claims of serious injury under Insurance Law § 5102(d) (*see Laracuente v Batia Realty Corp.*, 56 AD3d 294 [1st Dept 2009]).

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15902 The People of the State of New York, Ind. 3874/11
Respondent,

-against-

Jose Flores,
Defendant-Appellant.

_____

Dechert LLP, New York (Daphne Ha of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Fernando Tapia, J.), rendered June 4, 2013, convicting defendant, after a jury trial, of burglary in the first degree, robbery in the second degree (two counts), assault in the second degree, criminal impersonation in the first degree and petit larceny, and sentencing him to an aggregate term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The element of physical injury was established by evidence that, when viewed as a whole, supports the conclusion that the victim sustained substantial

pain. During a struggle over a pouch containing money, defendant kicked the victim, causing bruises and pain that lasted a few days. Defendant also punched the victim in the mouth with such force that he bent the braces on her upper teeth and broke a metal wire on the braces, thereby causing the braces to dig into her gums and the wire to cut her lip. The jury could have reasonably inferred that there was "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]).

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15903 The People of the State of New York, Ind. 2380/11
Appellant,

-against-

Ramon Carrasco,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Matthew Bova of counsel), for respondent.

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Order, Supreme Court, Bronx County (April A. Newbauer, J.), entered June 18, 2013, which granted defendant's motion to suppress physical evidence, unanimously affirmed.

Although the police lawfully stopped defendant's car for a traffic violation and lawfully arrested him when they learned his license was suspended, the record supports the hearing court's conclusion that the police had no lawful basis to search the car's center console, from which cocaine was recovered. There was no evidence in the record to support a finding that the officers could reasonably have concluded that "a weapon located within the vehicle present[ed] an actual and specific danger" to their safety (*see People v Mundo*, 99 NY2d 55, 58 [2002]). Defendant made no furtive movements, he complied with the police

directives and he provided his identification. The five-second delay before defendant responded to the officer's instruction to roll down the window, without more, was not a reasonable objective basis for suspicion of criminal activity.

Nor did the People meet their burden of establishing a valid inventory search. There was no evidence that the officers were aware of or followed a standard protocol which limited their discretion, or that the search was designed to produce an inventory (*see People v Gomez*, 13 NY3d 6, 11 [2009]).

In light of the foregoing, we find it unnecessary to reach defendant's procedural argument for dismissal of the People's appeal.

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15904 Melvin Castillo, Index 306525/12
Plaintiff-Appellant,

-against-

Jessenia Abreu, et al.,
Defendants-Respondents.

_____

Laurence M. Savedoff, PLLC, Bronx (Laurence M. Savedoff of counsel), for appellant.

Mead, Hecht, Conklin & Gallagher, LLP, White Plains (Kevin Conklin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 12, 2014, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to establish that he suffered a "serious injury" to his left shoulder, lumbar spine, or cervical spine within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion with respect to plaintiff's claims of serious injury to his lumbar spine and cervical spine, and otherwise affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury involving a permanent consequential or significant limitation in use of his spine or shoulder by submitting the affirmed reports of an orthopedic surgeon, who

found full range of motion in all parts, and a radiologist, who concluded that the MRI of plaintiff's left shoulder was normal and without evidence of acute injury (*see Kang v Almanzar*, 116 AD3d 540 [1st Dept 2014]).

In opposition, plaintiff raised a triable issue of fact as to his lumbar spine and cervical spine by submitting the affirmed MRI reports of a radiologist, who found multiple disc herniations in the lumbar spine and bulging discs in the cervical spine, and the report of his chiropractor, who measured significant limitations in spinal range of motion both shortly after the accident and recently (*see Pinzon v Gonzalez*, 93 AD3d 615, 615 [1st Dept 2012]). Defendants' orthopedic expert did not dispute that any spinal injuries were causally related to the accident, and plaintiff's chiropractor opined that there was a causal relationship, since plaintiff was only 19 years old and had no prior symptoms. Plaintiff's chiropractor also provided an explanation for his gap in treatment sufficient to raise an issue of fact (*see Young Kyu Kim v Gomez*, 105 AD3d 415, 415 [1st Dept 2013]).

Plaintiff, however, did not submit objective medical evidence sufficient to raise an issue of fact as to the existence of a serious shoulder injury causally related to the accident

(*see Figueroa v Ortiz*, 125 AD3d 491, 492 [1st Dept 2015]). His radiologist stated that his MRI revealed only evidence of edema indicative of recent trauma.

At trial, if plaintiff establishes a serious injury to his spine, he may recover for all injuries causally related to the accident, even those that do not meet the serious injury threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15906-
15907 In re Ariana Y.,

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

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Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about June 4, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the second and third degrees and menacing in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for

disturbing the court's credibility determinations. The evidence supported a finding that appellant was no mere onlooker, but an intentional participant in the offenses (*see* Penal Law § 20.00).

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15908 Francis Padilla, et al., Index 309679/11
Plaintiffs,

-against-

Zulu Services, Inc., et al.,
Defendants.

- - - - -

Zulu Services, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

F.W. Nagel,
Third-Party Defendant-Appellant.

_____

Russo, Apoznanski & Tambasco, Melville (Susan J. Mitola of counsel), for appellant.

Russo & Toner, LLP, Brooklyn (Stacy R. Seldin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about April 8, 2014, which, insofar as appealed from, denied the cross motion of third-party defendant F.W. Nagel (Nagel) for summary judgment dismissing the third-party complaint, unanimously reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment dismissing the third-party complaint.

It is well settled that "a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence

on the part of the driver of the rear vehicle" (*Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]). Here, Nagel demonstrated his entitlement to judgment as a matter of law by submitting evidence showing that his vehicle was stopped when it was rear-ended by a vehicle owned by defendant/third-party plaintiff Zulu Services, Inc. (Zulu Services) and operated by defendant/third-party plaintiff Yodeny Beltran (Beltran); plaintiffs were passengers in the vehicle driven by Beltran.

In opposition, Zulu Services and Beltran failed to raise a triable issue of fact. Their contention that Nagel stopped short is insufficient to rebut the presumption of negligence (*see Santos v Booth*, 126 AD3d 506 [1st Dept 2015]; *Cruz v Lise*, 123 AD3d 514 [1st Dept 2014]). Although Beltran had the duty to keep a safe distance between his vehicle and Nagel's vehicle, he never explained why he failed to do so despite his testimony that he

was watching Nagel's vehicle before the accident happened (*see* *Corrigan v Porter Cab Corp.*, 101 AD3d 471, 472 [1st Dept 2012]).

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15909 The People of the State of New York, Ind. 1185/10
Respondent,

-against-

Robert Bethea,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered May 12, 2011, as amended May 26, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree, tampering with physical evidence and resisting arrest, and sentencing him, as a second felony drug offender, to an aggregate term of four years, unanimously affirmed.

Defendant did not preserve his challenges to the court's determination, made after its *Sandoval* ruling, that the People would be permitted to elicit otherwise precluded aspects of defendant's criminal history if he raised claims of "lack of knowledge," or that he believed he was selling imitation drugs,

and we decline to review them in the interest of justice. As an alternative holding, we find that the court's warning was an appropriate exercise of discretion. The court properly found that by placing his intent or state of mind in issue, defendant would open the door to certain precluded matters (*see People v Ingram*, 71 NY2d 474, 479-480 [1988]). In any event, any error in the court's warning was harmless (*see People v Grant*, 7 NY3d 421, 424-425 [2006]).

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15910 The People of the State of New York, Ind. 4930/12
Respondent,

-against-

Vilma Bautista,
Defendant-Appellant.

_____

Dershowitz, Eiger & Adelson, P.C., New York (Nathan Z. Dershowitz of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered January 13, 2014, convicting defendant, after a jury trial, of criminal tax fraud in the first degree, offering a false instrument for filing in the first degree and conspiracy in the fourth degree, and sentencing her to concurrent terms of 2 to 6 years, 1 to 3 years, and 1 year, respectively, and restitution in the amount of $3,557,620, unanimously modified, on the law, to the extent of vacating the conspiracy conviction and remanding for a new trial on that count if the People be so advised, and for further proceedings pursuant to CPL 460.50(5) as to the remaining convictions, and otherwise affirmed.

Defendant and others were charged with conspiracy to commit grand larceny in the first and second degrees, criminal

possession of stolen property in the first and second degrees, and criminal tax fraud, based on allegations that they agreed to possess and sell four paintings they did not own, retain the proceeds, and conceal the proceeds from government authorities. Defendant, among others, completed the sale of one of those paintings for $32 million in 2010. The paintings had been acquired by Imelda Marcos decades earlier, when she was the First Lady of the Philippines, and allegedly should have been forfeited to the people of the Philippines. Defendant spent and gave away millions of dollars of the proceeds but failed to report the sale on her 2010 New York State tax return as required by law, thereby evading payment of more than $1 million in State taxes.

The trial court erred in reading or paraphrasing approximately eight sentences from an order of the Supreme Court of the Republic of the Philippines in a proceeding commenced by the Republic against Imelda Marcos and others, where the Philippine court granted summary judgment in favor of the petition, and ordered that more than $658 million held mostly in Swiss bank accounts be forfeited to the Republic. Only one sentence read by the court to the jury purported to state the law of the Philippines, namely Philippine Republic Act No. 1379, which provides that any property acquired by a public official

during his or her term of public service that is "manifestly out of proportion" to the official's public salary and any other lawful income "shall be presumed prima facie to have been unlawfully acquired." The remaining portions of the opinion read to the jury consisted of fact findings, and thus were not proper subjects of judicial notice pursuant to CPLR 4511(b) (*see Hamilton v Miller*, 23 NY3d 592, 603 [2014]).

The court implicitly applied collateral estoppel, which was inapplicable even under the standards governing civil cases, since defendant was not a party to the Philippine case and had no opportunity to litigate the issues therein; moreover, collateral estoppel should be applied with more caution in criminal cases than in civil (*see People v Aguilera*, 82 NY2d 23, 29-30 [1993]). The court further erred in paraphrasing the opinion without clarifying the rebuttable nature of the presumption under the Philippines law, and that error was compounded by the court's ruling precluding defense counsel from addressing that point in summation. We have considered and rejected the People's arguments that defendant's contentions regarding the Philippine opinion are unpreserved. However, we find that while the error was not harmless as to the conspiracy count, it was harmless as to the other counts, since there is no significant probability

that defendant would have been acquitted of the latter two counts in the absence of this error (*see People v Crimmins*, 36 NY2d 230, 242 [1975]). Accordingly, we vacate only the conspiracy conviction.

The court properly admitted emails exchanged between two of defendant's alleged coconspirators, her nephews, under the coconspirator exception to the hearsay rule. Contrary to defendant's argument, the People made a prima facie showing of conspiracy "without recourse to the declarations sought to be introduced" (*People v Bac Tran*, 80 NY2d 170, 179 [1992]). There was testimony indicating that one of defendant's nephews extensively participated in the painting sale at issue, and defendant sent $100,000 of the proceeds to him. Defendant also sent $5 million of the proceeds to the other nephew. Although defendant notes that the court relied in part on the emails at issue, the messages were properly considered to demonstrate the nephews' conduct, such as offering or arranging to offer certain prices and forwarding photographs of paintings to potential buyers, rather than for the truth of the messages (*see People v Salko*, 47 NY2d 230, 239 [1979]).

Under the state-of-mind exception to the hearsay rule (*see People v Matthews*, 16 AD3d 135, 137-138 [1st Dept 2005], *lv*

denied 4 NY3d 888 [2005]), the court properly admitted news articles and other documents, recovered in a search of defendant's home, concerning the Philippine government's efforts to recover artworks allegedly misappropriated by the Marcos administration. The circumstances warranted a reasonable inference that defendant was aware of these documents and their contents (*see People v Sutherland*, 154 NY 345, 352 [1897]), establishing her motive to conceal the sale of a painting allegedly given to her by the former First Lady. Thus, the evidence tended to rebut the defense argument that defendant's failure to report her income from the sale on her tax returns was not necessarily intentional. Contrary to defendant's argument, the People were not required to establish that defendant adopted the contents of the documents. Defendant's constitutional challenges to the admission of those documents are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find them unavailing. Moreover, we find that any error in the admission of these materials was harmless.

We agree with the court's evaluation, after an *in camera* review, that the notes on an interview with an alleged coconspirator were not *Brady* material. Moreover, there is no reasonable possibility that they would have affected the outcome

of the trial (*see People v Fuentes*, 12 NY3d 259, 263 [2009]), since the alleged coconspirator presumably would have invoked his Fifth Amendment right against self-incrimination if called by the defense.

Defendant was not deprived of a fair trial by the prosecutor's argument in summation that she was told by a tax attorney that she needed to declare her income from the sale of a painting. The tax attorney did not testify that he had directly so advised defendant, but rather testified that he met with defendant and one of her associates to discuss tax issues concerning the sale, and that the tax attorney advised the associate two weeks later of defendant's obligation to report the income. It was reasonable to infer that this information was conveyed to defendant. In any event, any impropriety in the prosecutor's statement did not rise to the level of reversible error (*see People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant did not preserve her contentions that the court failed to follow the proper procedure in adjudicating her *Batson* motion, and that she was deprived of a fair trial by the

prosecutor's allegedly excessive interruptions of defense counsel's opening statement and summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15911 In re Nyree R.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Nora Wong of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered March 31, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of endangering the welfare of a child, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. Evidence that appellant exposed his penis in front of the three-year-old victim, only 10 inches from the child's face, supported

the conclusion that appellant acted in a manner likely to cause harm to the child (*see* Penal Law 260.10[1]; *People v Simmons*, 92 NY2d 829 [1998]). The circumstances of the incident could reasonably be interpreted as evincing appellant's consciousness of guilt, and demonstrating his knowledge that his conduct was likely to cause harm.

The court properly admitted an out-of-court statement by the nontestifying victim, because it qualified as an excited utterance (*see People v Edwards*, 47 NY3d 493 [1979]). In any event, any error in this regard was harmless. We note that the court made no mention of this evidence in its detailed findings of fact, which marshaled the other evidence.

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15912 Shah N. Rabb, Index 305002/11
Plaintiff-Appellant,

-against-

Alam Mohammed, et al.,
Defendants-Respondents.

_____

A. Ali Yusaf, Richmond Hill (Stephen A. Skor of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered May 27, 2014, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously reversed, on the facts and the law, without costs, and the motion denied.

Defendants established prima facie that plaintiff did not suffer any serious injury as a result of the subject motor vehicle accident by submitting an affirmed report by a radiologist who found that the MRI of the left knee showed no injury and opined that the MRI of the lumbar spine showed only a disc bulge of degenerative origin unrelated to any trauma. In addition, they submitted an affirmed report by an orthopedic

surgeon who opined that the conditions purportedly found by plaintiff's orthopedic surgeon could not have been causally related to the accident (*see Santos v Perez*, 107 AD3d 572 [1st Dept 2013]).

In opposition, plaintiff raised triable issues of fact by submitting an affirmation by his treating orthopedist, who reviewed the MRI films, and concluded, based on his examinations and observations during surgery, that plaintiff suffered permanent injuries to his knee and lumbar spine (*see James v Perez*, 95 AD3d 788 [1st Dept 2012]). The orthopedist found limitations in range of motion shortly after the accident and persisting after treatment and arthroscopic surgery. He opined that the injuries were traumatically induced by the accident, noting that the MRI films showed no evidence of degeneration and that plaintiff was just 27 years old at the time of the accident, thereby raising an issue of fact as to causation (*see id.; see also Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]).

Defendants failed to establish that plaintiff did not sustain an injury of the 90/180-day category, since they neither disputed plaintiff's evidence that he did not return to work for more than three months following the accident nor provided evidence that he was able to perform his usual and customary

activities during the relevant period (*see Quinones v Ksieniewicz*, 80 AD3d 506 [1st Dept 2011]). Moreover, as indicated, in opposition to defendants' prima facie showing, plaintiff raised an issue of fact as to causation with his treating physician's evidence (*see James v Perez*, 95 AD3d at 789).

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15913 The People of the State of New York, Ind. 2920/10
Respondent,

-against-

Stanley Torres,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael Gross, J.), rendered August 6, 2013, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 25 years, unanimously affirmed.

The court properly declined to give a jury instruction regarding the voluntariness of defendant's videotaped statement, because there was insufficient evidence to present a factual dispute on the issue (*see People v Medina*, 93 AD3d 459 [1st Dept 2015], *lv denied* 19 NY3d 999 [2012]). The evidence cited by defendant, such as his use of drugs the night before his late afternoon interrogation, failed to raise such a dispute or support competing inferences.

The court properly excluded a toxicology report of defendant's blood, taken during his postarrest incarceration at Riker's Island, because defendant did not lay a proper foundation to establish the report's relevance (*see People v Bynum*, 33 AD3d 376 [1st Dept 2006], *lv denied* 7 NY3d 924 [2006]). Defendant's remaining evidentiary arguments are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15914 Orlando D. Almonte, Index 305163/13
Plaintiff-Respondent,

-against-

Clara Mancuso, et al.,
Defendants-Appellants.

_____

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

Terilli & Tintle, PLLC, Lake Success (Marshall D. Sweetbaum of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about January 20, 2015, which, to the extent appealed from as limited by the briefs, denied defendants' motion to compel plaintiff to provide an unrestricted authorization for production of his entire employment file with the MTA/New York City Transit Authority, unanimously modified, on the law and the facts, to grant the motion to the extent of requiring plaintiff to provide an authorization for any medical records related to the claimed injuries in his employment file from one year prior to the motor vehicle accident at issue to the present, and otherwise affirmed, without costs.

By bringing this action to recover for personal injuries allegedly suffered in a motor vehicle accident, plaintiff placed

his medical condition in controversy and waived the physician-patient privilege with respect to pertinent medical records (*see Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]; *Pirone v Castro*, 82 AD3d 431, 432 [1st Dept 2011]). Plaintiff has failed to proffer any reason for refusing to comply with the preliminary conference order to the extent it directed him to provide a written authorization for the release of medical records in his employment file (*see* CPLR 3121[a]; *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983]). Accordingly, defendants' motion should be granted to the extent indicated. However, the court providently exercised its discretion in determining that discovery of other documents that may be contained in plaintiff's employment file, including disciplinary records, is not material and necessary to the defense of the action.

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15915 The People of the State of New York, Ind. 1379/09
Respondent,

-against-

Miguel Rivera,
Defendant-Appellant.

_____

Goldstein & Weinstein, Bronx (David J. Goldstein of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc I. Eida of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered April 25, 2013, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 18 years, unanimously affirmed.

The court properly concluded that the People demonstrated, by clear and convincing evidence, an independent source for the victim's in-court identification notwithstanding a suppressed identification procedure (*see Neil v Biggers*, 409 US 188, 199-200 [1972]; *People v Williams*, 222 AD2d 149 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]). The victim testified that she was introduced to defendant as her sister's boyfriend or ex-boyfriend roughly two months before the incident in her sister's apartment,

where she observed him for up to 20 minutes, that she saw him again a few weeks later for 10 to 15 minutes while he was seated next to her sister in his truck, and a third time later the same day as he and her sister drove by (*see People v Clarke*, 265 AD2d 170 [1st Dept 1999], *lv denied* 94 NY2d 821 [1999]).

The court providently exercised its discretion in admitting a 911 call made by the victim's other sister as an excited utterance. The 911 operator repeatedly told the declarant to calm down, stop crying, and not become hysterical, and gave her instructions to administer first aid to the victim while they awaited an ambulance, thus demonstrating that the declarant was still under the stress of excitement from the incident (*see People v Edwards*, 47 NY2d 493, 497 [1979]; *People v Gantt*, 48 AD3d 59, 64 [1st Dept 2007], *lv denied* 10 NY3d 765 [2008]).

The court also properly exercised its discretion in denying defendant's application for a mistrial or for replacement of certain jurors following an encounter between defendant and several jurors in a courthouse elevator. The court conducted thorough, individual inquiries of all jurors, and concluded that each of the jurors could remain fair and impartial and would not be influenced by the elevator incident (*see People v Buford*, 69 NY2d 290, 299 [1987]).

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]). There is no basis for disturbing the jury's credibility determinations. The evidence amply supports the conclusion that defendant intended to cause serious physical injury to the victim, and that he caused such injury.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15916 The People of the State of New York, Dkt. 62661C/10
Respondent,

-against-

Gonslee Gordon,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered July 27, 2011, convicting defendant, upon his plea of guilty, of criminal contempt in the second degree, and sentencing him to a term of one year, and imposing an order of protection, unanimously affirmed.

Defendant failed to preserve his challenge to the issuance of the order of protection, and we decline to review it in the

interest of justice. As an alternative holding, we reject it on the merits. The record sufficiently reflects the reasons for the imposition of the order of protection (*see* CPL 530.12[5]).

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15917 In re Nakia C.,
Petitioner-Respondent,

-against-

Johnny F.R.,
Respondent-Appellant.

_____

Neal D. Futerfas, White Plains, for appellant.

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

_____

Order, Family Court, Bronx County (John J. Kelley, J.), entered on or about June 18, 2014, which, upon remand, found aggravating circumstances and imposed a five-year order of protection against respondent, based on his use of a dangerous instrument against petitioner, unanimously affirmed, without costs.

The determination that aggravating circumstances existed to warrant the imposition of a five-year order of protection against respondent is supported by the record (*see* Family Ct Act § 827[a][vii]; § 842). On the prior appeal (112 AD3d 538 [1st Dept 2013], we found, inter alia, that the Family Court erred in determining that there were no aggravating circumstances that would permit it to impose an order of protection for a duration longer than two years. We concluded that under the definition of

a "dangerous instrument," there is "no requirement that the person using the instrument intend to cause serious physical injury" (*id.* at 539; *see* Penal Law § 10.00[13]). We decline to reduce the duration of the order of protection, as the presence of aggravating circumstances indicates that a period of more than two years is necessary.

Respondent's request for vacatur of the finding that he had committed the family offense of aggravated harassment in the second degree is unpreserved, and we decline to review it in the interest of justice. In any event, vacatur of the finding would not require a reduction in the duration of the order of protection, which was based on the offense of reckless endangerment in the second degree (*see e.g. Matter of Liu v Yip*, 127 AD3d 1196 [2d Dept 2015]).

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

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15918 The People of the State of New York, Ind. 385/09
Respondent,

-against-

Rashaan Davis,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Laura Safer-Espinoza, J. at plea; John Moore, J. at sentencing), rendered on or about May 13, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: OCTOBER 20, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15919N Cassandra Williams, Index 306256/12
Plaintiff-Respondent,

-against-

Thomas R. Tompkins, et al.,
Defendants,

Environmental Planning & Management, Inc.,
Defendant-Appellant.

_____

Martin, Fallon & Mullé, Huntington (Richard C. Mullé of counsel), for appellant.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (David M. Schwarz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 6, 2015, which effectively denied defendant Environmental Planning & Management, Inc.'s (Environmental) motion to amend its answer, unanimously reversed, on the law, without costs, and the motion granted.

Given plaintiff's failure to show surprise or prejudice, the motion court abused its discretion in denying Environmental's motion to amend its answer to deny that defendant Thomas R. Tompkins was acting within the scope of his employment with Environmental at the time of the accident at issue (*see Lanpont v Savvas Cab Corp.*, 244 AD2d 208, 209 [1st Dept 1997]). A proper

showing of prejudice must be "traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add" (*A.J. Pegno Constr. Corp. v City of New York*, 95 AD2d 655, 656 [1st Dept 1983] [internal quotation marks omitted]). Plaintiff has made no such showing. In her opposition before the motion court, plaintiff asserted that she would be prejudiced by the amendment because Environmental "would be vicariously liable for the acts of [Thomas] Tompkins," if Tompkins was operating the vehicle within the scope of his employment. This is not the kind of significant prejudice necessary to deny an amendment to the pleading, as plaintiff would suffer the same "prejudice" if Environmental had raised its scope-of-employment defense in its initial answer. Moreover, her assertion of prejudice to the Tompkins defendants is unavailing, particularly as those defendants did not oppose Environmental's motion or its appeal.

On appeal, plaintiff argues that she would be prejudiced by the amendment because, at Thomas Tompkins's deposition, she was unable to take measures in support of her position that he was

acting within the scope of his employment with Environmental at the time of the accident. However, plaintiff does not say what measures she would have taken, and, in any event, discovery was not yet complete at the time of Environmental's motion. The parties may seek further discovery in light of this amendment.

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

ENTERED: OCTOBER 20, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Kapnick, JJ.

14444 In re Diane Mendez, Index 159047/12
Petitioner-Appellant,

-against-

New York City Department of Education,
et al.,
Respondents-Respondents.

_____

Rutkin & Wolf PLLC, Bronx (Jason M. Wolf of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered December 19, 2013, granting respondents' cross motion to dismiss the petition to annul two unsatisfactory ratings (U-ratings) for the summer 2011 and the 2011-2012 school year, to annul respondents' determination to terminate petitioner's probationary employment, and to reinstate her to the position of probationary teacher, and dismissing the proceeding brought pursuant to CPLR article 78, modified, on the law, to annul petitioner's termination, to annul the summer 2011 U-rating, to remand the matter to DOE for completion of its final review and recommendation consistent with this memorandum, and otherwise affirmed, without costs.

Petitioner Diane Mendez was a tenured common branches teacher for respondent New York City Department of Education who received satisfactory ratings since February 2010. She forfeited her tenure as a common branches teacher in order to obtain a position as a special education teacher. In September 2010, she was appointed a probationary special education teacher at P.S. X017, a Bronx high school, with a two-year probationary period ending in September 2012. She received a satisfactory rating on her Annual Professional Performance Review for the 2010-2011 school year.

During the summer of 2011, petitioner received an unsatisfactory rating for her work and was suspended without pay for four days based on an incident where she was found to have engaged in a loud argument with another teacher in front of students on August 2, 2011. Petitioner appealed the rating, and the Chancellor's Committee held a hearing commencing June 7, 2012. At the hearing, the Superintendent Representative conceded that the four-day suspension was "inappropriate" under the contract, and it was reversed because of the error.

We hold that the U-rating for the summer of 2011 lacked a rational basis and was arbitrary and capricious. Even accepting the testimony that petitioner engaged in a loud argument with

another teacher about sharing a room, there is no rational basis to find petitioner's conduct was unprofessional, insubordinate or unbecoming. Here, the subject of the argument concerned whether petitioner's students with disabilities should share space with students that composed the art cluster or obtain a larger classroom. There was no evidence presented that the content of conversation itself was unprofessional. The simple conduct of an argument without more elaboration on how the subject and language of the conversation was unprofessional is insufficient to provide a rational basis for professional misconduct. While the dissent argues, in essence, that we are making a credibility determination, this Court holds that the U-rating of summer 2011 was made without regard to the lack of substantial evidence showing unprofessional conduct. Further, petitioner's failure to admit that the conversation rose to the level of an argument is not evidence of insubordination.

As to the termination of petitioner's employment, it is well established that a "probationary employee may be discharged for any or no reason at all in the absence of a showing that [the] dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law" (*Matter of Brown v City of New York*, 280 AD2d 368, 370 [1st Dept 2001]). Nonetheless, given the

failure to establish a rational basis for the summer 2011 U-rating, petitioner established a deficiency in the review process to terminate petitioner's employment that was "not merely technical, but undermined the integrity and fairness of the process" (*Matter of Kolmel v City of New York*, 88 AD3d 527, 529 [1st Dept 2011]). The record demonstrates that petitioner has received satisfactory ratings since February 2010, which established her professional conduct but for the alleged incident of a loud argument.

Petitioner's challenge to the U-rating for the 2011-2012 school year was premature as she had not exhausted her administrative remedies (*see Matter of Leo v New York City Dept. of Educ.*, 100 AD3d 536 [1st Dept 2012]). A determination of her appeal of that rating had not yet been made at the time the petition was brought.

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

All concur except Sweeny, J. who dissents in part in a memorandum as follows:

SWEENY, J. (dissenting in part)

I agree with the majority that petitioner's challenge to the U-rating for the 2011-2012 school year was premature. However, I dissent from the majority's holding that the U-rating for the summer of 2011 lacked a rational basis and should be annulled.

"It is well settled law that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion or is contrary to law" (*Matter of Dempsey v New York City Dept. of Educ.*, 108 AD3d 454, 454-455 [1st Dept 2013], *affd* 25 NY3d 291 [2015], citing *Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363 [1999]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Moreover, "[i]f the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009] citing *Matter of Pell, supra*).

Although the majority finds that the U-rating for the summer 2011 period lacked a rational basis and was arbitrary and

capricious, the evidence in the record clearly contradicts its finding (*see Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576, 576 [1st Dept 2011]). Based on the testimony of the school's principal, the Hearing Officer determined that petitioner engaged in unprofessional conduct in the summer of 2011 by engaging in a loud argument with another teacher in front of students.

The majority observes that respondents did not present any witnesses at the hearing who testified as to the "tone" or "content" of the argument. This misses the point. The Hearing Officer, who was in the best position to determine the credibility of the witnesses, heard from the school's principal, Robin Cohen, who conducted the investigation into the summer 2011 incident. Cohen spoke to the assistant principal and another teacher who was present. Contrary to petitioner's claim that there was no argument, as well as the statement from three witnesses who stated there was no yelling, the assistant principal told Cohen that she heard yelling around the corner from her office and ran into the hallway and observed the argument in question. Although petitioner asserts that the witnesses were not permitted to testify, the record does not indicate that she ever requested their appearance at the hearing

(*see Matter of Brennan v City of New York*, 123 AD3d 607, 608 [1st Dept 2014]). In any event, hearsay is admissible at an administrative hearing (*see Matter of Brown v Ristich*, 36 NY2d 183, 190 [1975]; *Matter of Simpson v Wolansky*, 38 NY2d 391, 395 [1975]). Moreover, the Hearing Officer was not required to give more weight to a written statement of witnesses than to Cohen's testimony. In effect, the majority is making a credibility determination which is not the proper role of a reviewing court.

> "It is basic that the decision by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record. The Hearing Officer before whom the witnesses appeared, on the other hand, was able to perceive the inflections, the pauses, the glances and gestures - all the nuances of speech and manner that combine to form an impression of either candor or deception. For this reason . . . 'where there is a conflict in the testimony produced[,] . . . where reasonable men might differ as to whether the testimony of one witness should be accepted or the testimony of another be rejected, where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists" (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987], quoting *Matter of Stork Rest. v Boland*, 282 NY 256, 267 [1940], quoted in *Matter of Collins v Codd,* 38 NY2d 269, 270-271 [1976]).

There is no reason presented in this case to depart from

such a well settled, limited review role, and I would affirm the motion court's determination.

I must also dissent from the majority's determination to annul petitioner's termination.

The majority acknowledges the well settled principle that a "probationary employee may be discharged for any or no reason at all in the absence of a showing that [the] dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law" (*Matter of Brown v City of New York*, 280 AD2d 368, 370 [1st Dept 2001]). Nevertheless, it concludes that, "given the failure to establish a rational basis for the summer 2011 U-rating, petitioner established a deficiency in the review process to terminate petitioner's employment that . . . undermined the integrity and fairness of the process." This is not the standard to be applied to a probationary employee (*id.*). In any event, as discussed above, the evidence concerning

petitioner's unprofessional conduct in summer 2011 established that the discharge was made in good faith (*see Matter of Johnson v Katz*, 68 NY2d 649 [1986]). I would therefore also affirm the determination to discharge petitioner.

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

ENTERED: OCTOBER 20, 2015

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15099 Dylan P., an Infant under the Age of Fourteen, by his Mother and Natural Guardian, Raisa L., et al.,
Plaintiffs-Appellants,

-against-

Webster Place Associates, L.P.,
Defendant-Respondent.

Index 7412/07

_____

Alexander J. Wulwick, New York, for appellants.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered April 4, 2014, which granted defendant Webster Place Associates, L.P.'s motion for summary judgment dismissing plaintiffs' complaint, reversed, on the law, without costs, and the motion denied.

Defendant building owner moved for summary judgment solely on the basis that it had neither actual nor constructive notice of the alleged dangerous condition, a missing drain cover in the building's laundry room. Defendant failed to meet its initial burden of demonstrating that it did not have constructive notice (*see Williams v New York City Hous. Auth.*, 99 AD3d 613 [1st Dept 2012]). Although the building superintendent testified that he

routinely swept the laundry room every morning at 8:00 a.m. and performed daily inspections of the building, including the laundry room, at 11:00 a.m. and 8:00 p.m. each day, mere proof of a set janitorial schedule does not prove that it was followed on the day of the accident, or eliminate the issue of constructive notice in this case (*see Gautier v 941 Intervale Realty LLC*, 108 AD3d 481 [1st Dept 2013]; *Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept 2009]). The superintendent could not recall whether he had checked the laundry room on the day of the accident or offer any other evidence regarding the last time he inspected the laundry room prior to the accident (*see Raghu v New York City Hous. Auth.*, 72 AD3d 480 [1st Dept 2010] [janitor had a specific memory of following the cleaning schedule on the day of the accident]). He explicitly stated that he did know whether the allegedly defective condition existed on that date.

Since defendant failed to demonstrate adherence to the building maintenance and inspection schedule on the date of the accident, summary judgment was improperly granted (*Gautier v 941 Intervale Realty LLC*, *108* AD3D at 481-482). Although the dissent has examined the substance of plaintiffs' opposition and found it lacking, in view of defendant's failure to tender sufficient evidence to eliminate any material issues of fact on the issue of

constructive notice, we need not address the sufficiency of such opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

All concur except Tom, J.P. and Andrias, J. who dissent in a memorandum by Tom, J.P. as follows:

TOM, J.P. (dissenting)

Defendant building owner in demonstrated its entitlement to summary judgment "on the ground that plaintiff could not make out a prima facie case of negligence because there was no evidence that defendant either created or had actual or constructive notice of the alleged defect[] which plaintiff claims to have caused her [son's] injuries," a missing drain cover in the building's laundry room (*Raghu v New York City Hous. Auth.*, 72 AD3d 480, 481 [1st Dept 2010]). Plaintiff's opposition failed to raise an issue of fact bearing on the question of notice and was insufficient to defeat defendant's motion for summary judgment (*see Stankowski v Kim*, 286 AD2d 282, 283 [1st Dept 2001], *appeal dismissed* 97 NY2d 677 [2001]). Thus, defendant's summary judgment motion was properly granted.

The complaint alleges that on April 17, 2005 the infant plaintiff, Dylan P., sustained injury when the folding shopping cart in which he had been placed collapsed when a wheel caught in an open drain in the laundry room floor of defendant's apartment building. Dylan's mother, plaintiff Raisa L., testified that she used the cart to bring a month's worth of laundry to the basement and placed the infant in it so that she could unload the washing machine without worrying about him. As she pushed the cart

backwards to close the washing machine door, the front wheel caught in the drain and the cart fell backwards, collapsing on itself. As a result, Dylan sustained a fracture of the right femur.

The mother testified that there was no cover on the drain at the time she was in the laundry room on the date of the accident, but her testimony was inconsistent as to whether the drain cover was in place during any of the occasions she was in the laundry room prior to the accident date. At the outset, she stated that she was "not sure" if there was a cover on the drain before the day of the accident while, at the end of her deposition, when asked by counsel if she had "seen the drain cover missing prior to the date of the accident," she modified her testimony and responded affirmatively. In any event, she did not recall making a complaint about the open drain prior to the accident; nor was she aware that anyone else had made a complaint about the missing drain cover prior to the accident.

The building's full-time, live-in superintendent, Henry Benitez, testified that his regular daily routine included sweeping the laundry room every morning at 8:00 a.m. and inspecting the building at 11:00 a.m. and 8:00 p.m. He stated that he was available to tenants at any time and could be

contacted either directly or through the building's management company. To the best of his recollection, the only time the drain cover was missing was some time during 2006, which he duly reported to building management for repair. He was adamant that it was not missing in 2005, when Dylan was injured. He had observed that Dylan had a cast on his leg at some point later in 2005. At that time, he related, Dylan's mother told him only that the boy had sustained the injury in a fall, "playing or something to that effect." He did not learn that she attributed the injury to an incident in the laundry room until 2006.

Raisa L.'s contradictory testimony concerning whether the drain cover was missing prior to the date of the accident was insufficient to demonstrate that defendant had notice of the alleged hazardous condition so as to give rise to an affirmative duty to undertake remedial measures. To the contrary, her statement that she never notified anyone of the missing drain cover and was not aware that anyone else had notified building personnel of the alleged missing cover, together with the superintendent's deposition testimony that he sweeps the laundry room every morning and the cover was not missing at any time prior to 2006, made out a prima facie case for judgment dismissing the complaint on the ground that defendant lacked

notice of the asserted defect. Thus, it was plaintiffs' burden to present evidence in admissible form raising a material issue of fact to defeat the motion (CPLR 3212 [b]) or, alternatively, to provide an acceptable excuse for the failure to comply with the strict requirement to tender proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The majority concludes that summary dismissal of the complaint is unwarranted because the superintendent did not state that he observed his usual custom of cleaning and inspecting the laundry room on the morning of the accident. Because it is undisputed that the superintendent was not present at the time of the accident and, in fact, did not learn of the infant's injury until well after it occurred, requiring him to account for his actions on that specific day surrounding an event of which he was unaware imposes an unreasonable evidentiary burden on the defense. The superintendent testified that his regular daily routine includes sweeping the laundry room every morning at 8:00 a.m. But in any event, the only factual issue that might be raised by his failure to follow his customary procedure on the date of the incident is confined to whether the drain cover was in place at the time of the accident. There is no evidence offered by plaintiff that the drain cover was missing before the

incident.

The operative issue is whether there is admissible proof that defendant or its employees acquired timely knowledge of the existence of the alleged hazardous condition so as to afford them sufficient opportunity to remedy the defect *prior* to the accident (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). That Benitez might not have gone into the laundry room to sweep and inspect it merely supports defendant's position that there is no evidence its employees acquired such knowledge. The role of the court on a summary judgment motion "is confined to determining whether an issue of fact exists as a matter of law" (*Phillips v Kantor & Co.*, 31 NY2d 307, 315 [1972]); commensurately, it is a precondition to the grant of summary judgment that the movant eliminate any material issue of fact requiring trial (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Since plaintiffs have come forward with no admissible evidence to ascribe knowledge of the asserted defect to defendant at any time before the accident occurred, they have not established notice, a necessary element of their case. Having failed to demonstrate that defendant had actual or constructive notice of the missing drain cover, there is no basis upon which a jury could find that defendant breached any duty of

care (*id.*), and no issue of fact is presented precluding summary dismissal.

In sum, the record is devoid of any basis upon which to attribute either actual or constructive knowledge of the asserted defective condition to defendant owner of the premises. Defendant's superintendent stated that he discovered that the drain cover was missing on one occasion in 2006 – a minimum of some eight months after the April 2005 accident – and "[t]hat would have been the one and only time it happened." He further testified that "the drain cover wasn't missing in 2005." The testimony relied upon by plaintiffs only raises the factual issue of whether the drain cover was in place during the time plaintiffs were in the laundry room on the date of the accident. It does not demonstrate that the cover had been removed prior to that time and, most significantly, it does not establish that defendant or its employees were made aware that it was missing.

Since plaintiffs are unable to rebut defendant's prima facie showing of entitlement to summary judgment, the complaint was properly dismissed.

Accordingly, the order should be affirmed.

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

ENTERED: OCTOBER 20, 2015

CLERK

Corrected Order - February 19, 2016

Mazzarelli, J.P., Acosta, Saxe, Manzanet-Daniels, JJ.

15170 Murray Schwartz, Index 150229/12
Plaintiff-Respondent, 157070/12

-against-

Hotel Carlyle Owners Corporation, et al.,
Defendants-Appellants,

New World Development Co.,
Defendant.

- - - - -

[And Another Action]

_____

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

Davidoff Hutcher & Citron, LLP, New York (Malcolm S. Taub of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 11, 2014, which, insofar as appealed from as limited by the briefs, denied defendants Hotel Carlyle Owners Corporation, the Carlyle LLC, the Carlyle, a Rosewood Hotel, Alexandra E. Tscherne and Greg Dinella's (defendants) motion for summary judgment dismissing plaintiff's claim for breach of the covenant of quiet enjoyment against defendant Hotel Carlyle Owners Corporation (hotel) and his claims for trespass, conversion and punitive damages against all defendants, unanimously reversed, on the law, without costs, and the motion

granted. The Clerk is directed to enter judgment **dismissing the complaint**.

Plaintiff, the owner of a residential suite in the Carlyle Hotel, alleges that, following a water leak that occurred in July 2011, the hotel's agents trespassed in his apartment and converted specified items of personal property, and that the hotel breached the covenant of quiet enjoyment in the proprietary lease.

Defendants demonstrated entitlement to dismissal of the trespass claim because the proprietary lease for the apartment permits the hotel to enter the apartment for purposes of assessing leak damage and making repairs. Defendants further demonstrated that their agents left the apartment as soon as plaintiff objected. Since the essence of a trespass is intentional entry onto the property of another without justification or permission (*see Volunteer Fire Assn. of Tappan, Inc. v County of Rockland*, 101 AD3d 853, 855 [2d Dept 2012]), plaintiff's allegations that the hotel's agents mishandled his drapery and otherwise exacerbated the conditions caused by the leak do not support a trespass claim.

With respect to the conversion claim, defendants demonstrated an absence of any evidence that any of them, as

opposed to plaintiff's own agents, were responsible for taking plaintiff's personal property or that they were currently in possession of it (*see Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]).

As for plaintiff's remaining claim, in actions for damages for breach of the covenant of quiet enjoyment, a tenant must show an ouster, or if the eviction is constructive, an abandonment of the premises (*Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]). Constructive or actual eviction requires that "there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]).

Defendants submitted an affidavit of the hotel's director of finance with invoices demonstrating that plaintiff was credited with a rent abatement from August 2011 through April 2012, and that plaintiff thereafter failed to make any payments of monthly maintenance pursuant to the proprietary lease. Defendants also demonstrated that plaintiff received compensation from his insurer for additional living expenses while the apartment was uninhabitable, even though his primary and secondary residences are elsewhere, and that any delays in completing repairs to the

apartment after April 2012 were not due to any unreasonable conduct on the part of the hotel. In opposition to defendants' prima facie showing, plaintiff provided no evidence that he had any uncompensated damages resulting from his inability to resume residence after the flood, and did not raise an issue of fact as to whether any wrongful act on the part of the hotel prolonged his alleged inability to resume residence (*see Barash*, 26 NY2d at 82).

In any event, plaintiff's failure to pay rent "constitutes an election of remedies," so that he has no claim for damages (*Frame v Horizons Wine & Cheese*, 95 AD2d 514, 518 [2d Dept 1983]; *see Bostany v Trump Org. LLC*, 88 AD3d 553, 554 [1st Dept 2011]). This legal argument, raised by defendants on appeal, appears on the face of the record and can therefore be reviewed (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]).

Plaintiff's claim for punitive damages does not survive the dismissal of the substantive claims and, in any event, is insufficient since he has not alleged or provided any evidence that defendants acted in a morally reprehensible manner (*see New*

York Univ. v Continental Ins. Co., 87 NY2d 308, 315-316 [1995]).

The Decision and Order of this Court entered herein on May 19, 2015 is hereby recalled and vacated (*see* M-2872 decided simultaneously herewith).

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

ENTERED: OCTOBER 20, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Feinman, JJ.

15364N Joan Banach, Index 600918/09
Plaintiff-Petitioner-
Respondent-Appellant,

-against-

The Dedalus Foundation, Inc.,
Defendant-Respondent-
Appellant-Respondent.

- - - - -

Bantle & Levy LLP,
Nonparty-Respondent.

- - - - -

National Employment Lawyers
Association/New York,
Amicus Curiae.

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Pryor Cashman LLP, New York (Perry M. Amsellem of counsel), for appellant-respondent.

Bantle & Levy LLP, New York (Lee F. Bantle of counsel), for respondent-appellant.

Emery Celli Brinckerhoff & Abady LLP, New York (Jonathan S. Abady of counsel), for respondent-appellant and respondent.

Giskan Solotaroff Anderson & Stewart, LLP, New York (Darnley D. Stewart of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 28, 2014, which, to the extent appealed from, denied defendant's motion to, among other things, reinstate and compel compliance with a subpoena ad testificandum and duces tecum served upon plaintiff's counsel Bantle & Levy, and denied

plaintiff's motion for discovery sanctions and to compel disclosure of certain documents and information, unanimously modified, on the law and the facts, to grant plaintiff's motion to compel disclosure, and otherwise affirmed, without costs.

The court properly refused to reinstate a subpoena that it had previously quashed, since the subpoena sought documents and testimony protected by the attorney-client privilege (*Bohn v 176 W. 87th St. Owners Corp.*, 106 AD3d 598, 600 [1st Dept 2013], *lv dismissed in part and denied in part* 22 NY3d 909 [2013]). The record shows that the subpoena sought information from plaintiff's counsel for the improper purpose of impeaching plaintiff (*see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244, 245 [1st Dept 2008]). Moreover, defendant failed to show a sufficient basis for applying the crime-fraud exception to the attorney-client privilege (*see Matter of Grand Jury Subpoena*, 1 AD3d 172, 173 [1st Dept 2003]).

The court should have compelled disclosure of all materials and information requested by plaintiff, as the requested discovery is relevant to her defense of defendant's counterclaims (*see* CPLR 3101[a]). Defendant waived its attorney-client privilege regarding the requested minutes of a board meeting, by using portions of those minutes during a deposition and by

placing the contents of the minutes at issue (*see Drizin v Sprint Corp.*, 3 AD3d 388, 389-390 [1st Dept 2004]; *Orco Bank v Proteinas Del Pacifico*, 179 AD2d 390, 390 [1st Dept 1992]). Thus, plaintiff's request for disclosure of the full unredacted minutes of the meeting should have been granted.

Discovery sanctions against defendant are not warranted, as there was no prior order directing the exchange of the items sought, and no evidence of willful or contumacious conduct (*see Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542 [1st Dept 2012]).

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

> The Decision and Order of this Court entered herein on June 9, 2015 is hereby recalled and vacated (*see* M-4556 decided simultaneously herewith).

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

ENTERED: OCTOBER 20, 2015

CLERK