SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 26, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

14625-
14626 In re Charmaine M.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about February 27, 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 grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed her with the Administration for Children's Services 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. There is no basis for disturbing the court's determinations concerning credibility. Appellant and another girl placed themselves in very close proximity to the victim, on opposite sides of her, while a third girl stole the victim's phone. Appellant then fled with the other girls. This evidence supports an inference that appellant was no mere onlooker, but was an intentional participant in the theft, whose role was to block the victim or otherwise render assistance as needed (*see Matter of Antoine C.*, 124 AD3d 433 [1st Dept 2015]).

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

ENTERED: MARCH 26, 2015

CLERK

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

14623 The People of the State of New York, Ind. 1404/13
Respondent,

-against-

Brian Nin,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about October 24, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MARCH 26, 2015

CLERK

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

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

14627 Lisa Claudio, as Administrator of the Estate of Jayson Tirado, etc., et al., Plaintiffs-Appellants, -against- Sean Sawyer, Defendant, The City of New York, Defendant-Respondent. Index 104877/10

Queller, Fisher, Washor, Fuchs & Kool, LLP, New York (Matthew J. Maiorana of counsel), for appellants.

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

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered November 1, 2013, which granted defendant City of New York's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

In this action alleging, among other things, causes of action against defendant City for negligent training and instruction arising from the shooting of decedent by defendant Sawyer, an off-duty police officer, after a "road rage" related altercation, the motion court properly found that, defendant Sawyer's act of shooting the decedent was a private, intentional

act that occurred outside the scope of his employment as a police officer. Accordingly, any alleged deficiencies in the City's training and instruction of its officers could not have proximately caused decedent's injuries (*see Campos v City of New York*, 32 AD3d 287, 291-292 [1st Dept 2006], *appeal denied* 8 NY3d 816 [2007], *lv dismissed* 9 NY3d 953 [2007]; *Cardona v Cruz*, 271 AD2d 221, 222 [1st Dept 2000]).

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

ENTERED: MARCH 26, 2015

CLERK

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

14628 The People of the State of New York, Ind. 4991/10
Respondent,

-against-

Robert Trevino,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered October 7, 2011, as amended November 3, 2011 and November 15, 2011, convicting defendant, after a jury trial, of burglary in the first degree, attempted robbery in the first and second degrees, kidnapping in the second degree (three counts) and endangering the welfare of a child (two counts), and sentencing him, as a second felony offender, to an aggregate term of 25 years, unanimously modified, on the law, to the extent of vacating the kidnapping convictions and dismissing those counts of the indictment, and otherwise affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v*

Prochilo, 41 NY2d 759, 761 [1977]). The police responded to a radio run of a robbery in progress at a particular building. Although there was no specific description of the perpetrators, when the officers saw defendant hurriedly leaving the building, they had an "objective, credible reason, not necessarily indicative of criminality" (*People v Hollman*, 79 NY2d 181, 184 [1992]) to believe that defendant might have information about the robbery, and for asking him where he was coming from and requesting identification. This level one request for information was not based on the general character of the neighborhood, but upon the officer's awareness of a robbery at the specific building in question. In response to questions that were within the scope of a level one inquiry, defendant displayed an agitated demeanor and failed to provide the name or apartment number of the person he claimed to have been visiting. This gave rise to founded suspicion of criminality, and his flight, when added to the preexisting factors, justified his pursuit and detention by the police (*see id.* at 184-85).

Whether the court properly admitted the photograph of the gun, any prejudice was minimized by the court's limiting instructions. In light of the overwhelming evidence of defendant's guilt, any error was harmless.

The evidence failed to establish that the restraint of the victims was sufficiently distinct from the burglary and attempted robbery so as to support kidnapping charges. Accordingly, we vacate the kidnapping convictions under the merger doctrine (*see People v Cassidy*, 40 NY2d 763 [1976]).

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

ENTERED: MARCH 26, 2015

CLERK

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

14630 In re Javon Lawrence M., etc.,

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

Priscilla P.,
Respondent-Appellant,

SCO Family of Services,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

Ralph R. Carrieri, Mineola, for respondent.

_____

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about February 22, 2013, which, after a fact-finding determination that respondent mother had permanently neglected the subject child, terminated the mother's parental rights and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that, despite the agency's diligent efforts, the mother failed for the relevant time period to visit the child regularly, complete the required service plan, and address the problems that led to the child's placement, such as domestic

violence by the child's father (*see* Social Services Law § 384-b[7]; *see also Matter of Brian T. [Jeannette F.]*, 121 AD3d 500, 500-501 [1st Dept 2014]).

A preponderance of the evidence supports the finding that termination of the mother's parental rights is in the child's best interests (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The agency caseworker testified that the foster mother wanted to adopt the child and that the child was happy in the foster home, where he has lived virtually his entire life. Further, the evidence showed that the mother visited the child only four times since November 2011, still had contact with the child's father, who engaged in domestic violence against her, and was unwilling to acknowledge the problems that led to the child's removal (*see Matter of Emily Jane Star R. [Evelyn R.]*, 117 AD3d 646, 647-648 [2014]).

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

ENTERED: MARCH 26, 2015

CLERK

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

14632 The People of the State of New York, Respondent, Ind. 4162/11

-against-

Michael Pena, Defendant-Appellant.

_____

Ephraim Savitt, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered May 7, 2012, convicting defendant, after a jury trial, of three counts of predatory sexual assault, and three counts of criminal sexual act in the first degree, and sentencing him to an aggregate term of 75 years to life, unanimously affirmed.

The court lawfully imposed consecutive sentences for defendant's three predatory sexual assault convictions. Defendant, an off-duty police officer, threatened to shoot the victim, and dragged her into an alleyway and a courtyard. There, defendant pointed his firearm at the victim's head and committed three criminal sexual acts. As relevant here, a person is guilty of predatory sexual assault when (1) he or she commits the crime

of first-degree criminal sexual act, and (2) during the commission of that crime, he or she uses or threatens the immediate use of a dangerous instrument (Penal Law § 130.95[1][b]). Although defendant's convictions on three counts of predatory sexual assault involved a single transaction and shared the dangerous instrument element, consecutive sentences were permissible because the three criminal sexual acts were separate and distinct (*see People v Yong Yun Lee*, 92 NY2d 987, 989 [1998]).

Defendant did not preserve his claim that his aggregate sentence was unconstitutionally excessive (*see People v Ingram*, 67 NY2d 897, 899 [1986]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Rummell v Estelle*, 445 US 263 [1980]; *People v Broadie*, 37 NY2d 100 [1975], *cert denied* 423 US 950

[1975]).

We perceive no basis for reducing the sentence in the interest of justice.

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

ENTERED: MARCH 26, 2015

CLERK

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

14633 The People of the State of New York, Ind. 6068/11
Respondent,

-against-

Arthur Piastro,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about April 27, 2012, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 26, 2015

CLERK

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

14634 Robert Jordan, Index 300924/11
Plaintiff-Respondent,

-against-

City of New York,
Defendant-Appellant.

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered May 29, 2013, which granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Defendant's argument that plaintiff failed to establish with admissible evidence how the accident happened, since the unsworn written statements by the workers who were doing the hoisting and witnessed the accident were inadmissible, is unpreserved, as it is improperly raised for the first time on appeal (*see Stier v One Bryant Park LLC*, 113 AD3d 551 [1st Dept 2014]). We decline to review it in the interest of justice.

The motion court properly rejected the City's argument that Labor Law § 240(1) was inapplicable, because the rail that struck

plaintiff did not fall from a "physically significant elevation differential." We agree with the motion court's finding that the pile of rails that were stacked two and one-half to three feet high was not de minimis, given the approximately 1500 pound weight of the rail and "the amount of force it was capable of generating, even over the course of a relatively short descent" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474 [1st Dept 2012]; *Brown v VJB Constr. Corp.*, 50 AD3d 373, 376-377 [1st Dept 2008]). The harm plaintiff suffered was the direct consequence of the application of the force of gravity to the rail that struck plaintiff (*see Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]).

"What is essential to a conclusion that an object requires securing is that it present a foreseeable elevation risk in light of the work being undertaken" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 269 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). It was foreseeable that during hoisting, a crane could strike the stacked pile of rails causing it to fall (*see Harris v 170 E. End Ave., LLC*, 71 AD3d 408, 409-410 [1st Dept 2010], *lv dismissed* 15 NY3d 911 [2010]), and therefore, the rail that struck plaintiff was an object that required securing for

the purposes of the undertaking (*see Arnaud v 140 Edgecomb LLC*, 83 AD3d 507 [1st Dept 2011]). We are not persuaded by the City's contention that plaintiff failed to identify a necessary and expected safety device, as plaintiff demonstrated that the City could have used secure braces, stays, or even additional lines to stabilize the stacked rails (*cf. Guallpa Leon D. DeMatteis Constr. Corp.* (121 AD3d 416 [1st Dept 2014] [plaintiff's claim dismissed where its tenor was that injury was caused by the absence or inadequacy of a safety device other than one contemplated by the statute]).

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

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

ENTERED: MARCH 26, 2015

CLERK

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

14637-
14637A The People of the State of New York, Respondent,

Ind. 1295/11
3494/11

-against-

Justice Waring,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Diane A. Shearer of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Troy K. Webber, J.), rendered on September 26, 2012, convicting defendant, upon his pleas of guilty, of robbery in the third degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of five years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

Defendant's challenge to imposition of the mandatory surcharge is premature; it should be raised in the sentencing court by a motion for resentencing at the end of defendant's

incarceration, and not on direct appeal (*People v Bradley*, 249 AD2d 103 [1st Dept 1998], *lv denied* 92 NY2d 923 [1998]).

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

ENTERED: MARCH 26, 2015

CLERK

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

14638 Roberto Santo-Perez, Index 309974/11
Plaintiff-Appellant,

-against-

Enterprise Leasing Company, et al.,
Defendants,

Anthony A. Hill,
Defendant-Respondent.

_____

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

Carman, Callahan & Ingham, LLP, Farmingdale (Michael M. Burkart of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about November 19, 2013, which granted defendant Anthony A. Hill's motion for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, and the motion denied.

While the fact that plaintiff was crossing the street on foot outside of the crosswalk, in violation of Vehicle and Traffic Law § 1152(a), is evidence of negligence on his part, the record presents a triable issue of fact whether defendant Hill, operating a vehicle, contributed to the accident by failing to exercise due care to avoid a collision with plaintiff. Indeed,

Hill testified that he saw plaintiff before the collision and had time to activate his horn and move his vehicle to the double line before reducing his speed by half (*see* Vehicle and Traffic Law § 1146; *Ryan v Budget Rent a Car*, 37 AD3d 698 [2d Dept 2007]).

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

ENTERED: MARCH 26, 2015

CLERK

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

14639 Coast to Coast Energy, Inc., et al., Plaintiffs-Appellants, -against- Mark Gasarch, et al., Defendants-Respondents, Continental Drilling Corporation, Defendant. Index 602044/09

Law Office of Edward J. Boyle, Manhasset (Edward J. Boyle of counsel), for appellants.

Trief & Olk, New York (Barbara E. Olk of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 23, 2014, which, to the extent appealed from as limited by the briefs, granted defendants Mark Gasarch and Gasmark Corp.'s (Gasarch and Gasmark) (defendants) motion to dismiss the second amended complaint asserting a cause of action for breach of contract, unanimously affirmed, without costs.

Defendants' motion to dismiss the second amended complaint was properly granted since plaintiffs failed to allege that Gasarch and Gasmark were parties to the contracts at issue. The doctrine of judicial estoppel is inapplicable since there is no inconsistency between Gasarch and Gasmark's arguments on the

prior motion and their current position that they were not parties to the agreement (*see Bergman v Indemnity Ins. Co. of N. Am.*, 275 AD2d 675, 676 [1st Dept 2000]).

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

ENTERED: MARCH 26, 2015

CLERK

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

14640 Roka, LLC, Index 111504/08
Plaintiff-Appellant, 590949/08

-against-

Hing Lam, et al.,
Defendants-Respondents,

Taweewat Hurapan, et al.,
Defendants.

[And a Third-Party Action]

_____

Sperber Denenberg & Kahan, P.C., New York (Eric Kahan of counsel), for appellant.

Dai & Associates, P.C., New York (Jacob Chen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered April 23, 2014, which, to the extent appealed from, following a nonjury trial, dismissed plaintiff's cause of action seeking to pierce the corporate veil and hold defendants Hing Lam and Chester Chen (defendants) personally liable for unpaid rents, unanimously affirmed, without costs.

While defendants did not observe all corporate formalities, the fact that they ran a real business, with employees, customers and vendors, and that all of the company's debts were paid while they owned the company, supported the trial court's dismissal of

plaintiff's alter ego claim (*cf. Fern, Inc. v. Adjmi*, 197 AD2d 444, 445 [1st Dept 1993] [the evidence showed, inter alia, that defendant exercised complete dominion and control of corporate entity, which had no assets, liabilities, income, or regularly elected officers or directors, and had never transacted any business other than entering the lease agreement at issue for which unpaid rent was owed plaintiff]). Moreover, because defendants sold their shares of the company six months prior to the default in rent payments about which plaintiff complains, any failure to observe the corporate form could not have proximately caused plaintiff's loss (*see James v Loran Realty V Corp.*, 85 AD3d 619, 620 [1st Dept 2011], *affd* 20 NY3d 918 [2012]).

To the extent the transfer of defendants' shares in the company violated the text of the limited assignment clause in the lease, the fact that the transfer was disclosed to plaintiff beforehand, and that plaintiff accepted rent after the transfer for several months, bars a claim that defendants used the transfer to defraud or mislead plaintiff.

Defendants' statements in their codefendant's bankruptcy could not give rise to judicial estoppel, because they did not obtain any relief in that proceeding (*see Sunseri v Macro Cellular Partners*, 263 AD2d 365 [1st Dept 1999]).

Finally, the court's finding that defendants were personally liable for a tort of conversion with regard to certain equipment did not contradict the finding that they were not alter egos of the corporation on the failure to pay rent claim.

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

ENTERED: MARCH 26, 2015

CLERK

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

14641 The People of the State of New York, Ind. 5326/11
Respondent,

-against-

Gregory Vining,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered July 18, 2012, convicting defendant, after a jury trial, of attempted assault in the third degree, assault in the third degree, criminal mischief in the fourth degree, and criminal trespass in the second degree, and sentencing him to an aggregate term of 2 years, unanimously modified, on the law, to the extent of vacating the attempted assault conviction and dismissing that count of the indictment, and otherwise affirmed.

The court properly exercised its discretion in admitting a phone call placed by defendant to the victim while defendant was incarcerated, in which the victim repeatedly stated that defendant had broken her ribs. The record supports the court's findings that defendant heard and understood the victim's

accusation, and that a person in defendant's position would have been expected to answer (*see People v Koerner*, 154 NY 355, 374 [1897]; *People v Frias*, 250 AD2d 495 [1st Dept 1998], *lv denied* 92 NY2d 982 [1998]). Rather than directly addressing the victim's statement, defendant repeatedly attempted to change the subject, such as by asking the victim whether she meant that he posed a "threat" to her. It is not dispositive that defendant asked the victim to repeat herself after the fourth out of five times she stated that he had broken her ribs, since defendant did not otherwise indicate that he was unable to hear or understood her. Although the phone call was recorded by the Department of Correction pursuant to a standard policy made known to all inmates, the rule excluding "silence in the face of police interrogation" (*People v DeGeorge*, 73 NY2d 614, 618 [1989]) was not implicated, since defendant's admissions by silence were made to a civilian. Moreover, the court's thorough limiting instructions also minimized any potential unfair prejudice.

The court should have granted defendant's request to redact the portion of the phone call in which both defendant and the victim referred to the particular sentence they expected defendant to receive in the event of a conviction. However, we find the error to be harmless in light of the court's thorough

instructions.

The court's brief response to the jury note provides no basis for reversal where the court immediately repeated its charge on the criminal trespass counts (*see People v Simmons*, 66 AD3d 292 [1st Dept 2009], *affd* 15 NY3d 728 [2010]; *see also People v Jackson*, 38 AD3d 1052, 1054 [3d Dept 2007], *lv denied* 8 NY3d 986 [2007]).

We find that the court's inquiry about a partial verdict did not have any coercive or prejudicial effect and did not contravene CPL 310.70 (*see e.g. People v Brown*, 1 AD3d 147 [1st Dept 2003], *lv denied* 1 NY3d 625 [2004]), *People v Mendez*, 221 AD2d 162, 163 [1st Dept 1995], *lv denied* 87 NY2d 923 [1996]).

As the People concede, the attempted third-degree assault count is a lesser included offense of the third-degree assault count.

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

ENTERED: MARCH 26, 2015

CLERK

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

14642N In re Declan Spelman, Index 150367/14
Petitioner-Appellant,

-against-

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

_____

Alexander J. Wulwick, New York, for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about June 18, 2014, which denied petitioner's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying petitioner's application. While the absence of a reasonable excuse for the delay is not, standing alone, fatal to the application (*Matter of Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]), here petitioner did not demonstrate either that respondents received actual knowledge of the facts constituting his claims of negligence and Labor Law violations

within the statutory period, or the absence of prejudice resulting from the delay (*see Mehra v City of New York*, 112 AD3d 417, 417-418 [1st Dept 2013]).

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

ENTERED: MARCH 26, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14246 Olga Fedorova, Index 21293/11E
Plaintiff-Appellant,

-against-

Mark Kirkland, et al.,
Defendants-Respondents.

_____

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

Wade Clark Mulcahy, New York (Gabriel E. Darwick of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered March 21, 2014, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that she suffered serious injuries to her left knee, left shoulder, cervical spine, and lumbar spine, as a result of having been knocked over by defendants' vehicle as she was crossing the street. In support of their motion for summary judgment, defendants submitted some of plaintiff's medical records showing, among other things, that the then 65-year-old plaintiff had been diagnosed with arthritis in both knees years

before the accident, and that she had indicated to a psychiatrist that she did not suffer any physical injuries as a result of the accident, but had become fearful of crossing streets.

Defendants also submitted an expert report from an orthopedist who reviewed some of the medical records and conducted a physical examination of plaintiff two years after the accident. He concluded that plaintiff had malignment and degenerative arthritis in both knees, consistent with her obesity and age. He noted, however, that he rendered this opinion without the benefit of the medical records from the time of the accident or from the arthroscopic surgery performed six weeks later. Accordingly, defendants' orthopedists's findings are conclusory and insufficient to establish entitlement to judgment as matter of law.

In addition, defendants submitted a report from a radiologist who failed to indicate his area of medical specialization which states that the MRI films taken after plaintiff's accident show pre-existing, degenerative conditions in all body parts, and no evidence of injury caused by the accident. Neither the radiologist nor defendants' orthopedist referenced the medical report, also submitted by defendants, from Dr. Joseph Minta, plaintiff's internist, who performed a complete

medical examination less than one week after the accident, indicating that plaintiff complained of pain and discomfort in her left knee, left shoulder, and back (i.e., the same injuries for which plaintiff seeks compensation in this action). Dr. Minta concluded, based on plaintiff's complaints and history, that the accident "seems to be the causative factor of the [patient's] symptomatology." Thus, defendants themselves have submitted evidence that raises a question of fact as to causality, and precludes summary judgment. Since defendants failed to make a prima facie showing, the motion court should have denied the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [emphasis in original], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Even if defendants established that none of plaintiff's injuries were caused by this accident, summary dismissal would still not be warranted. Plaintiff has met her burden of establishing that there are material issues of fact requiring a trial (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). She submitted the postoperative report from the arthroscopic surgery performed on her left knee which provides a diagnosis of a tear of the medial meniscus and the lateral meniscus, as well as

degenerative changes to the medial and lateral femoral condyles, and multiple loose bodies. Plaintiff provides, as well, a more recent affirmation from her orthopedic surgeon which indicates that at the time of surgery, the diagnosis was a torn medial meniscus that was causally related to the accident. Although defendants argue that the second narrative report contradicts the postsurgical report, we note that both reports indicate that the torn meniscus was surgically repaired, with the postsurgical report distinguishing between the degenerative conditions and the tear, and the narrative report stating explicitly that the tear was not degenerative but the result of trauma. This sufficiently raises a question as to the nature and cause of plaintiff's knee injury (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Because plaintiff has sufficiently established that at least some of her injuries meet the "no-fault" threshold, we do not need to examine her proof with respect to the other injuries (*see Linton v Nawaz*, 14 NY3d 821, 822 [2010]). If the trier of fact determines that plaintiff sustained a serious injury, it may award damages for all her injuries causally related to the

accident, even those that do not meet the threshold (*see Angeles v American United Transp., Inc.*, 110 AD3d 639, 640 [1st Dept 2013]).

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: MARCH 26, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14405 The People of the State of New York, Ind. 5558/10
Respondent,

-against-

Stanley Hardee,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg 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 (Charles H. Solomon, J. at suppression hearing; Michael J. Obus, J. at plea and sentencing), rendered January 22, 2013, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, affirmed.

The officers lawfully stopped defendant's vehicle after they observed it speeding down Lexington Avenue, weaving in and out of traffic without signaling. When questioned while inside the vehicle, defendant kept looking at the back seat, prompting the officer who was addressing defendant to tell him to "concentrate on me."

Defendant was asked about Styrofoam cups in the center

console, and one officer recalled defendant answering that there was a little bit of vodka in the cup. The officer testified that although defendant was told that the alcohol was not a big deal and that he should relax, defendant continued to move about and repeatedly looked in the back seat and at his front seat passenger.

When the officers asked defendant to stop moving around and to step out of the car, he did not comply until the request was repeated two or three times. Although a frisk of defendant did not reveal a weapon, he continued to look over his shoulder toward the area directly behind the front passenger seat, where a shopping bag in which a gun was later found was located. In addition, defendant disregarded the officers' warnings that he would be handcuffed if he did not comply with their directives. One officer testified that defendant's behavior led him to believe that defendant was either going to fight or flee, and that he should be handcuffed for all of the officers' safety. After allowing the officer to place one of the handcuffs on his right wrist, defendant began to resist and fight the officers.

Another officer testified that, based on his experience, he knew that the officer who frisked defendant was concerned that defendant was armed. He also testified that defendant's

demeanor, persistent movements inside the vehicle, repeated looking into the back seat, and refusal to follow directives, led him to believe that there was a weapon inside the car, and that it might be in the bag he had observed on the floor behind the passenger seat in the area where defendant kept glancing. Accordingly, the officer conducted a very limited search, grabbing the bag. After sensing that the bag's heavy weight was consistent with a weapon, the officer looked inside and saw the handle of a semiautomatic weapon protruding from another, smaller bag. The officer yelled "gun" and then exited the vehicle to assist his fellow officers, who were still struggling to subdue defendant.

Preliminarily, there is no basis for disturbing the court's finding that the officers who testified at the hearing were credible, which is fully supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Nor is there any basis for disturbing the court's finding that defendant's sole witness, his fiancée, "whose testimony was internally inconsistent in many significant respects," was not believable.

Considering the totality of the circumstances, defendant is not entitled to suppression of the weapon. The testimony supports the trial court's finding that the facts available to

the officers, including defendant's furtive behavior, suspicious actions in looking into the back seat on multiple occasions and refusal to follow the officers' legitimate directions, went beyond mere nervousness. Rather, defendant's actions both inside and outside of the vehicle created a "perceptible risk" and supported a reasonable conclusion that a weapon that posed an actual and specific danger to their safety was secreted in the area behind the front passenger seat, which justified the limited search of that area, even after defendant had been removed from the car and frisked (*People v Mundo*, 99 NY2d 55, 59 [2002]; *People v Carvey*, 89 NY2d 707, 709-711 [1997]; *People v Washington*, 91 AD3d 534, 535 [1st Dept 2012], *lv denied* 18 NY3d 999 [2012]; *People v Vehap*, 234 AD2d 210 [1st Dept 1996], *lv denied* 90 NY2d 865 [1997]; *People v Hutchinson*, 22 AD3d 681, 683-684 [2d Dept 2005]).

All concur except Acosta, J.P. who dissents in a memorandum as follows:

ACOSTA, J.P. (dissenting)

I believe defendant is entitled to suppression of a pistol found by the police in a shopping bag located on the floor of the back seat of a car defendant was driving. Evidence that, during a traffic stop, defendant behaved in a very nervous manner, looked several times toward the back seat of the car, and failed to comply with the officers' directives, was not sufficient to lead to a reasonable conclusion that a weapon located within the car presented an actual and specific danger to the officers' safety so as to justify a limited search of the car after defendant had been removed from the car and frisked without incident. There was no testimony that defendant looked in the specific direction of the bag or even the floor. Accordingly, there was nothing that could be analogized to movements within a car to reach or conceal something, which could reasonably have been taken to indicate the presence of a concealed weapon (*see People v Newman*, 96 AD3d 34, 42 [1st Dept 2012], *lv denied* 19 NY3d 999 [2012]). In the absence of objective indicators that could lead to a reasonable conclusion that there was a

substantial likelihood that a weapon was located in defendant's car, the search was unlawful since no actual and specific danger threatened the safety of the officers (*see People v Hackett*, 47 AD3d 1122, 1124 [3d Dept 2008]; *Matter of Terrell W.*, 301 AD2d 536 [2d Dept 2003]).

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

ENTERED: MARCH 26, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, JJ.

14759 Ronald Keibel, et al., Index 301989/07
Plaintiffs-Respondents,

-against-

Louis Riina, et al.,
Defendants-Appellants.

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Rende, Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for Louis Riina, appellant.

Rafferty & Redlisky, LLP, Rye Brook (Robert G. Rafferty of counsel), for 1047 Gun Hill Realty Corp., appellant.

Pacheco & Lugo, PLLC, Brooklyn (Betty Lugo and Carmen A. Pacheco of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 23, 2013, which denied defendants' motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

Defendants complied with the plain wording of Supreme Court's January 27, 2012 order regarding the timing for renewal of their summary judgment motions. Even if the renewed motions may nevertheless be considered untimely despite the lack of clarity in Supreme Court's January 27, 2012 order, such lack of clarity constituted the requisite "good cause" for the late

filing (*see Vila v Cablevision of NYC*, 28 AD3d 248, 249 [1st Dept 2006]; CPLR 3212[a]).

Turning to the merits, defendants were entitled to summary judgment. The duties that defendant Louis Riina owed the injured plaintiff, as either owner or vice president of Gun Hill Tile, Inc. d/b/a Gen Tile, to maintain the premises safely are indistinguishable from the duties he owed as owner of the property (*see Macchirole v Giamboi*, 97 NY2d 147, 150 [2001]; *Concepcion v Diamond*, 224 AD2d 189, 189-190 [1st Dept 1996]). Thus, plaintiffs' claims against him are barred by Workers' Compensation Law § 29(6).

Defendant 1047 East Gun Hill Realty Corp. established prima facie that it did not own, occupy, possess, manage, maintain or control the premises. In opposition, plaintiffs failed to raise a triable issue of fact in this regard.

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

ENTERED: MARCH 26, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14154 Anyie B., as Mother and Natural Guardian of Kailen L., etc., Plaintiff-Appellant, Index 23852/05 85962/07

-against-

Bronx Lebanon Hospital, Defendant-Respondent,

Morris Heights Health Clinic, et al., Defendants.

[And a Third-Party Action]

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Lisa M. Comeau, Garden City, for appellant.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 7, 2013, reversed, on the law, without costs, and the motion denied.

Opinion by Acosta, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Paul G. Feinman
Darcel D. Clark
Barbara R. Kapnick, JJ.

14154
Index 23852/05
85962/07

_____x

Anyie B., as Mother and Natural Guardian of Kailen L., etc.,
Plaintiff-Appellant,

-against-

Bronx Lebanon Hospital,
Defendant-Respondent,

Morris Heights Health Clinic, et al.,
Defendants.

[And a Third-Party Action]

_____x

Plaintiff appeals from the order of the Supreme Court, Bronx County (Stanley Green, J.), entered October 7, 2013, which granted defendant Bronx Lebanon Hospital's motion for summary judgment dismissing the complaint as against it.

Lisa M. Comeau, Garden City, for appellant.

Heidell, Pitoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondent.

ACOSTA, J.P.

This medical malpractice action stems from alleged injuries caused during plaintiff's labor and delivery at defendant hospital. Specifically, plaintiff's complaint alleges that defendant Bronx Lebanon Hospital Center (defendant) failed to, among other things, monitor the fetal heart rate (FHR) in light of plaintiff's oligohydramnios (low amniotic fluid), and perform a timely Caesarian section. Plaintiff claims that, as a result of defendant's departures, her infant daughter Kailen sustained ischemic hypoxia (a loss of oxygen), resulting in severe neurological injuries, including irreparable brain damage, profound retardation, speech difficulties, cerebral palsy, microcephaly, left hemiparesis (weakness), motor and language delays, and cognitive impairment.

Defendant moved for summary judgment dismissing the complaint. In support thereof, it submitted the affirmed report of Adiel Fleischer, M.D. and the affidavit of Michelle R. Lasker, M.D. Defendant argued that there was no evidence of hypoxia during the labor and delivery, nor was there any causal connection between any alleged departure and Kailen's current injuries, since Kailen was healthy at birth. The motion court ultimately dismissed the complaint finding that although "plaintiff may have established a question of fact regarding the

existence of hypoxia," she failed to raise triable issues of fact regarding causation. We disagree and reverse.

A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). Once a defendant meets that burden, the plaintiff must rebut the prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged (*see id.*).

Generally, "the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). To defeat summary judgment, the expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" *Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007][quoting *Ferrara v South Shore Orthopedic Assoc.*, 178 AD2d 364 [1st Dept 1991]).

Here, in opposition to defendant's motion for summary

judgment, plaintiff raised triable issues of fact as to both departure from good and accepted medical practice and causation. Plaintiff submitted a redacted report from her expert, a doctor board-certified in obstetrics and gynecology, who opined that defendant departed from the standard of care by failing to properly monitor the FHR strips, which would have revealed hypoxia caused by oligohydramnios (insufficient amniotic fluid); failing to perform resuscitative efforts once the FHR tracings were flat, by providing oxygen and performing an amnioinfusion; and failing to perform a C-section hours prior to the vaginal delivery. The expert opined that these departures caused Kailen to suffer intrapartum asphyxia and hypoxia, resulting in brain damage and other injuries.

Specifically, plaintiff's expert observed that on December 15, 1995, when plaintiff (41 weeks gestation) went to defendant Morris Heights Health Clinic, a sonogram noted an amniotic fluid index (AFI) of 2.3 cm., indicating oligohydramnios. The expert stated that the median AFI at 40 weeks is about 12.3 cm and at 42 weeks, is about 11 cm. Oligohydramnios is diagnosed when the AFI is less than 5.0 cm. As a result of the decreased AFI, defendant clinic sent plaintiff to defendant hospital where she arrived at approximately 10:55 pm.

Plaintiff's expert opined that, while the fetal monitoring

strips were initially reassuring during the overnight hours, at about 5:00 a.m. on December 16th, the strips started to show a decrease in the fetal heart rate baseline, with "prolonged decelerations" and "late decelerations" during the night. The tracings then became non-reassuring (abnormal), which was the result of a lack of oxygen or hypoxia to the fetus, who was not tolerating labor with reduced amniotic fluid. Once the tracings became flat, good and accepted standards of practice required oxygen administration to plaintiff, placing her in the left lateral position, and starting an amnioinfusion, which defendant did not do at that time.

Plaintiff's expert further opined that changes observed in the FHR, including a prolonged deceleration manifested as a drop in baseline from 150-155 beats per minute (bpm) at 5:15 a.m., and at about 6:20 a.m., followed by a decrease in beat-to-beat variability though 6:33 a.m., were indicative of potential hypoxia. The expert stated that defendant also departed from the standard of care by failing to perform a C-section between about 11:45 a.m. and 2:10 p.m. on December 16th, during which time period there were long stretches where defendant failed to monitor fetal status and no fetal heart beat was picked up on the tracings. When the tracings did pick up at about 2:10 p.m., they were flat. The expert asserted that defendant made no effort to

insert an internal fetal heart monitor (an electronic transducer connected to the fetal scalp) during this time and failed to undertake efforts to resuscitate the infant.

The expert noted that plaintiff's membranes ruptured spontaneously at 5:00 p.m., at which time defendant applied an internal heart monitor and the fetal heart tracing appeared reassuring with mild variables and good recovery to baseline. However, at about 5:40 p.m., there was a prolonged deceleration, a slow return to baseline and a loss of beat-to-beat variability. Another late deceleration occurred at about 6:20 p.m., and, it was at this time that defendant began administering oxygen and started an amnioinfusion. Plaintiff's expert stated that, despite these efforts, the fetal heart tracing continued to be flat and non-reassuring until about 9:30 p.m., when a C-section should have been performed.

Plaintiff's expert asserted that from 9:30 p.m. (on December 16th) until 1:40 a.m. (on December 17th), the fetus continued to be in distress and continued to suffer from a lack of oxygenation and hypoxia resulting in the infant sustaining the subject brain injuries. The expert further asserted that the fetal monitoring strips showed multiple instances of decelerations, and decreased or minimal beat to beat variability for extended periods of time. The expert opined that the decreased variability could not be

merely evidence of a fetal sleep cycle, since there were too many instances thereof throughout the strips. The strips were indicative of a fetus in distress and defendant failed to timely undertake proper resuscitative efforts. The expert also asserted that the fetal strips were indicative of hypoxia due to a low amniotic fluid level, which was "2.9," and that the strips were non-reassuring. With respect to the infant plaintiff's injuries, plaintiff's expert asserted that they were not genetic, but, rather, the result of hypoxia during labor, since later genetic testing on the infant in 2008 came back normal.

Further, the expert opined that plaintiff, who was over 40 weeks gestation, suffered from placental insufficiency, which can cause insufficient blood flow to the placenta; oligohydramnios, a sign of fetal distress; and a decrease in fetal activity, which can lead to hypoxia. Since placental insufficiency was evident in fetal tracings, closer monitoring during labor would have shown hypoxia caused by a low amniotic fluid level. Thus, the expert concluded that Kailen's microcephaly, developmental delays and mental retardation were more likely than not caused by hypoxia while she was in utero as a result of undiagnosed, and/or untreated oligohydramnios.

Plaintiff's second expert, Dr. Daniel Adler, board-certified in pediatrics and psychiatry and neurology with a special

qualification in child neurology, stated that hypoxic-ischemic encephalopathy is the brain injury caused by asphyxia or oxygen deprivation. Impaired blood flow is one of the events leading to intrapartum asphyxia. If brain injury is not suspected at the time of birth, diagnosis can be made by way of clinical observation over time, when visible signs of brain injury such as impaired motor function and delayed developmental milestones are observed.

Dr. Adler asserted that maternal blood supply to the placenta is normally reduced by increased pressure resulting from contractions during labor, which may be augmented by compression of the umbilical cord, normally cushioned by amniotic fluid. However, during oligohydramnios, the cord may be compressed between the fetus and abdominal wall, further restricting oxygen levels to the fetus. Dr. Adler explained that fetal heart monitor tracings that show flat line tracings with reduced or minimal beat-to-beat variability and prolonged or late decelerations in the fetal heart rate are indicators of fetal distress and poor oxygenation to the fetus. Brain injuries resulting from decreased oxygenated blood flow to a fetus can be prevented by, among other things, oxygen administration to the mother, I-V hydration, stopping Pitocin, amnioinfusion and emergency C-section. Failure to timely respond to non-reassuring

tracings or tracings indicative of fetal distress can result in hypoxic-ischemic encephalopathy or brain damage.

Based on Dr. Adler's examination of the infant on July 12, 2012, when she was 12 years old, and plaintiff's expert's redacted report regarding the fetal monitoring strips, Dr. Adler opined that the infant suffered from intrapartum hypoxia, resulting in brain damage that manifested itself as static encephalopathy, microcephaly, left hemiparesis, motor and language delay and cognitive impairment.

Contrary to defendant's assertion, plaintiff's medical evidence was sufficient to defeat summary dismissal of the complaint. Defendant's argument that plaintiff's experts failed to rebut its contention that, in the absence of any signs or symptoms of permanent neurological injury at or near the time of Kailen's birth, there is no medical basis for connecting her current condition with the "circumstances of the labor and delivery," is unavailing. Dr. Adler's assertions that brain injuries at the time of birth can be diagnosed based on observations over time contradict defendant's contention. In addition, a report prepared by Dr. Joseph Carfi, dated March 21, 2012, based on his physical examination of Kailen, and medical records, including those from defendant and the Center for Congenital Disorders, notes that Kailen was diagnosed at the

Center for Congenital Disorders on May 23, 1996, when she was five months old, with microcephaly, and mild developmental delay. By 2012, she suffered significant mental retardation with developmental delays and lack of age appropriate personal independence. Her impairments are permanent and preclude her from living alone as an adult. Thus, although Kailen had excellent Apgar scores and otherwise appeared normal at birth, plaintiff nonetheless raised triable issues of fact as to causation (*Diaz*, 99 NY2d at 544; *see also Hayden v Gordon*, 91 AD3d 819, 821 [2d Dept 2012] [summary judgment not appropriate in medical malpractice action where parties adduce conflicting medical expert opinions]).

Fernandez v Moskowitz (85 AD3d 566 [1st Dept 2011]), relied on by defendant does not dictate a different result. In *Fernandez*, this Court found that the defendants were entitled to summary judgment dismissing the complaint on the ground that plaintiff failed to establish a hypoxic-ischemic brain injury. The evidence supporting such a conclusion included normal brain MRI results, early normal development, no signs of delay until the infant plaintiff was two years old, and proof of a genetic condition that explained at least part of the child's condition (visual impairment). Here, in contrast, Kailen had an abnormal CT scan at age five months, MRI results indicative of

intracranial abnormality, very early signs of delay that caused her mother to seek treatment by the time she was less than five months old, and a genetic explanation has been ruled out.

Accordingly, the order of the Supreme Court, Bronx County (Stanley Green, J.), entered October 7, 2013, which granted defendant Bronx Lebanon Hospital's motion for summary judgment dismissing the complaint as against it, should be reversed, on the law, without costs, and the motion denied.

All concur.

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

ENTERED: MARCH 26, 2015

CLERK