SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 19, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7283-
7283A Index 105190/07

Cadlerock Joint Venture, L.P.,
Plaintiff-Appellant,

-against-

Sol Greenberg & Sons International, Inc., et al.,
Defendants-Respondents.

Vlock & Associates, P.C., New York (Steven P. Giordano of counsel), for appellant.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered May 20, 2010, which, to the extent appealed from, denied plaintiff's motion for contempt to the extent of declining to adjudge defendants Marilyn Greenberg, Marshall Greenberg and Ronald Greenberg in contempt for their failure to produce documents and appear for deposition in response to the post-judgment subpoena, unanimously reversed, on the law and the facts, with costs, the motion granted, and the matter remanded for further proceedings consistent herewith. Order, same court and Justice, entered November 18, 2010, which, to the extent appealed from as limited by the brief, denied plaintiff's motion

for sanctions, costs and attorneys' fees and declined to order defendant Sol Greenberg & Sons International, Inc. (SGSI) to appear for a continued deposition, unanimously reversed, on the law and the facts, with costs, the motion granted, with sanctions to be imposed on defendants' counsel in the amount of $10,000, payable to the Lawyers' Fund for Client Protection, SGSI ordered to appear for continued deposition to be conducted under court supervision, and the matter remanded to Supreme Court for assessment of the costs and attorneys' fees incurred by plaintiff in making the motion for sanctions and taking this appeal.

Supreme Court improvidently exercised its discretion in only adjudging defendant SGSI in contempt for its failure to produce documents and appear for deposition in response to the post-judgment subpoena. There is no dispute that all four judgment debtors were in violation and contempt of the post-judgment subpoena served on them, as each failed to produce documents and appear for deposition. Moreover, the subpoena served upon the judgment debtors, in connection with the judgment creditor's efforts to enforce court orders, clearly sought documents and deposition testimony relevant to the satisfaction of the judgment against them (*see* CPLR 5223; *Yeshiva Tifferes Torah v Kesher Intl. Trading Corp.*, 246 AD2d 538 [1998]).

At the deposition in this matter, defendants' counsel, Mr.

Joseph R. Sahid, repeatedly interrupted the questioning and made improper objections and lengthy speeches that had no merit. He also improperly interrupted the witness's answers and conferred with the witness (his client) mid-answer. He insulted plaintiff's counsel, Justice Solomon and her clerk, and even the court reporter, who was eventually compelled to leave the deposition due to the abuse of defendants' counsel.

Pursuant to 22 NYCRR 130-1.1 (a), a court "in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" and, in "addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part" (*see also Tag 380, LLC v Ronson*, 51 AD3d 471 [2008]).

As defined in subdivision (c) of 22 NYCRR 130-1.1, conduct is frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts

material factual statements that are false."

We find that the conduct of defendants' counsel was undertaken primarily to delay or prolong the resolution of the litigation and to harass plaintiff. We also find that counsel's arguments at the deposition were totally without merit in law. While we recognize that Supreme Court referred Mr. Sahid's conduct to the Disciplinary Committee, we find that his frivolous, outrageous, and unprofessional behavior warrants sanctions, costs and attorneys' fees.

Inasmuch as Mr. Sahid's conduct prevented plaintiff from completing the deposition at which Marshall Greenberg appeared on behalf of SGSI, it is appropriate that Marshall Greenberg appear again to complete the deposition, which should be conducted under court supervision.

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

ENTERED: APRIL 19, 2012

CLERK

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7424 In re Joel Diaz, Index 105924/10
Petitioner-Respondent,

-against-

Raymond W. Kelly, as Police Commissioner of the City of New York, etc., et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for appellants.

Law Offices of Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered January 13, 2011, which granted the petition to annul respondents' determination denying petitioner's request to amend his application for accidental disability retirement (ADR) benefits, and remanded the matter with the direction that petitioner be allowed to amend his application to include a heart-related disability, unanimously affirmed, without costs.

The Board's determination was arbitrary and capricious and an abuse of discretion (*see* CPLR 7803[3]). At the time respondent Board of Trustees denied petitioner's application for ADR benefits based on an orthopedic condition, a member of the Board was aware that petitioner had suffered a heart attack, was

incapacitated, and might wish to amend his application to include a claim under the Heart Bill. Moreover, there is evidence in the record that petitioner's heart condition predated his retirement, but was not diagnosed until after he retired (*see Matter of Mulheren v Board of Trustees of Police Pension Fund, Art. II*, 307 AD2d 129 [2003], *lv denied* 100 NY2d 515 [2003]).

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

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

ENTERED: APRIL 19, 2012

CLERK

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7425 In re Robert V. C.,
Petitioner-Appellant,

-against-

Polly V. H.,
Respondent-Respondent.

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Polly V. H., respondent pro se.

Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about September 10, 2008, which, upon the parties' respective objections to the Support Magistrate's order, entered June 3, 2008, dismissing petitioner's petition for a downward modification in child support, vacated the June 3, 2008 order and reinstated a June 30, 2006 support order of $1,817 per month, unanimously affirmed, without costs.

Petitioner failed to show a substantial change in circumstances warranting a downward modification of the support award (*see Matter of Sullivan v Sullivan*, 22 AD3d 415 [2005]). He provided no documentation to substantiate his claimed income or his claimed receipt of public assistance. He failed to produce an up-to-date diary detailing his job search for work commensurate with his training and experience (*see O'Brien v McCann*, 249 AD2d 92 [1998]).

Petitioner was properly advised of his right to counsel. We have considered petitioner's remaining contentions and find them unavailing.

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

ENTERED: APRIL 19, 2012

CLERK

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7426 In re Thomas Mitchell, etc., Index 340221/10
Petitioner-Appellant,

-against-

New York City Department of Correction,
Respondent-Respondent.

Steven Banks, The Legal Aid Society, New York (Barbara P. Hamilton of counsel), for appellant.

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

Judgment, Supreme Court, Bronx County (George R. Villegas, J.), entered on or about August 18, 2010, denying the petition to annul respondent's determination, dated February 22, 2010, which found petitioner guilty of assaulting three corrections officers and imposed a penalty of 90 days in solitary confinement and restitution of $100, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition granted, the determination annulled, the charges against petitioner dismissed, and respondent directed to expunge all references to the charges from petitioner's institutional records.

The hearing officer failed to provide petitioner with a written statement summarizing the testimony of three witnesses

who testified in his favor, and failed to state her reasons for rejecting the testimony of those witnesses and of petitioner, in violation of New York City Department of Correction Directive 6500R-B(III)(C)(38)(d). Respondent is required to comply with its own regulation (*see Matter of Bryant v Coughlin*, 77 NY2d 642, 647 [1991]).

Respondent waived its defense that petitioner failed to exhaust his administrative remedies by failing to raise the defense in its answer (*see Matter of SCS Bus. & Tech. Inst. v Barrios-Paoli*, 156 AD2d 288 [1989]).

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

ENTERED: APRIL 19, 2012

CLERK

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7428 Roselyne Gisors, Index 116808/08
Petitioner-Appellant,

-against-

New York City Department of Education
for the City School District Region 10,
et al.,
Respondents-Respondents.

Roselyne Gisors, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered July 22, 2010, denying the petition to vacate an arbitration award dated November 14, 2008, and granting respondents' cross motion to dismiss the proceeding brought pursuant to Education Law § 3020-a and CPLR 7511, unanimously affirmed, without costs.

The award was made in accord with due process, is supported by adequate evidence, is rational and is not arbitrary and capricious (*see Lackow v Department of Education of City of N.Y.*, 51 AD3d 563, 567 [2008]). Contrary to petitioner's contention, hearsay evidence can be the basis of an administrative determination (*Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988]), and each of the specifications upheld by the hearing officer was

supported by testimony of witnesses having personal knowledge of the material facts or hearsay evidence that substantiated the basis for the charges. The hearing officer's credibility findings are entitled to deference (*see Matter of D'Augusta v Bratton*, 259 AD2d 287, 288 [1999]), and there is no basis upon which to disturb those findings.

Petitioner's arguments to vacate or modify the determination (*see* CPLR 7511[b]), including that the hearing officer was biased and exceeded her authority in reaching a determination without affording petitioner due process, are refuted by the record. Petitioner was afforded every opportunity to present a defense and she acknowledges intentionally attempting to stonewall the proceedings by not appearing for and/or not participating on many of the hearing dates. Petitioner's argument that the findings of the hearing officer were predetermined is conclusory and otherwise undermined by the evidence which supports the findings. Moreover, petitioner failed to meet her burden of showing, by clear and convincing evidence, that the hearing officer was partial in her consideration of the evidence and ultimate determination (*see Matter of Infosafe Sys. [International Dev. Partners]*, 228 AD2d 272, 272-273 [1996]).

The penalty of six months suspension, without pay, was neither shocking to our sense of fairness nor disproportionate to

the multiple offenses (*see Matter of Pell v Board of Educ. of the Union Free School Dist. No. I of Towns of Scardale & Mamaroneck, Westchester Co.*, 34 NY2d 222, 232-233 [1974]), given that petitioner's actions tended to undermine the credibility of the Academy's grading system, involved repeated tampering with multiple school records, and circumvented the authority of the school.

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

ENTERED: APRIL 19, 2012

CLERK

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7431 In re Yohannan Kunju, Index 260731/10
Petitioner-Appellant-Respondent,

-against-

MTA, et al.,
Respondents-Respondents-Appellants.

Barry D. Haberman, New City, for appellant-respondent.

Martin B. Schnabel, New York (Mariel A. Thompson of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered on or about June 20, 2011, which denied the petition to vacate an arbitration award, and dismissed the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

Petitioner's application to vacate the arbitration award was made more than 90 days after the award was delivered to him and is therefore untimely (*see* CPLR 7511[a]; *Werner Engers Co. v NY City Law Dept*, 281 AD2d 253, 253 [2001]). In any event, while CPLR article 75 provides a mechanism by which a party may obtain judicial confirmation of an arbitration award, the failure to have an award confirmed is not a ground for vacating the award (*see* CPLR 7510; CPLR 7511[b][1]).

Petitioner now claims that he seeks vacatur under CPLR 751l(b)(1)(iv). This argument is unavailing as well as

unpreserved, since subd (iv) is "failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection." Petitioner participated in the arbitration without objection as to the procedure employed.

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

ENTERED: APRIL 19, 2012

CLERK

CORRECTED ORDER - MAY 30, 2012

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7432 In re Tiana N.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), and Laura Dillon, Kings Park, for appellant.

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

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about October 13, 2011, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the second degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in imposing probation rather than a conditional discharge. This was the least restrictive alternative consistent with appellant's needs

and the needs of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The underlying offense was an unprovoked and violent assault in which appellant, along with others, struck the victim with a metal cane, causing injury. In addition, appellant's school disciplinary and attendance record was poor.

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

ENTERED: APRIL 19, 2012

CLERK

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7434 The People of the State of New York, Ind. 5379N/09
Respondent,

-against-

Standish Dublin,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about June 2, 2010,

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: APRIL 19, 2012

CLERK

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

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7435-
7436 Index 112377/08

Citizens Insurance Co. of America, doing business as Hanover Insurance Group,
Plaintiff-Appellant,

-against-

Aristotle Hatzigeorgiou, etc., et al.,
Defendants-Respondents.

Ryan & Conlon, LLP, New York (William F. Ryan of counsel), for appellant.

Pillinger Miller Tarallo, LLP, Elmsford (C. William Yanuck of counsel), for Aristotle Hatzigeorgiou, Alexandra G. Juliano, Michael Maglio, Global Entertainment Group, LLC and Play, respondents.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for Anna Fernandez, respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered July 9, 2010, which denied plaintiff insurer's motion for summary judgment, and, upon searching the record, granted summary judgment to defendants insureds declaring that plaintiff is obligated to defend and indemnify defendants insureds in an underlying personal injury action, and order, same court and Justice, entered July 18, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to renew, unanimously affirmed, without costs.

In its motion for summary judgment, plaintiff asserted that it timely disclaimed coverage for the underlying accident by letter dated July 9, 2008. In opposition, defendants asserted that the July 9, 2008 letter was not a notice of disclaimer, but a reservation of rights, and that plaintiff did not disclaim coverage until commencing this declaratory judgment action more than two months after receiving notice of the underlying action, which was untimely as a matter of law. Supreme Court agreed with defendants and denied plaintiff's motion. Plaintiff then moved to renew based on the "new facts" that it actually sent a letter disclaiming coverage on July 16, 2008 and that it never sent the "draft" letter dated July 9, 2008.

Supreme Court properly denied the motion to renew, as plaintiff did not provide a reasonable justification for failing to present the July 16, 2008 letter on the prior motion (*see* CPLR 2221[e][3]; *Whalen v New York City Dept. of Envtl. Protection*, 89 AD3d 416, 417 [2011]). Plaintiff's excuse that its counsel inadvertently attached the wrong letter in its prior motion papers is unreasonable, given that, in reply to defendants' opposition to the original motion, plaintiff submitted a sworn affidavit from its agent attesting to the fact that the July 9, 2008 letter was the disclaimer letter sent to defendants. The agent's affidavit on renewal asserting that the July 16, 2008

letter is the actual disclaimer letter contradicts her prior sworn affidavit; accordingly, Supreme Court properly determined that the failure to submit the July 16, 2008 letter was more than mere law office failure.

Plaintiff is not entitled to summary judgment, as the July 9, 2008 letter was the only letter before the court on the original motion, and plaintiff asserts that the letter was never sent.

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

ENTERED: APRIL 19, 2012

CLERK

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7437 The People of the State of New York, Respondent, Ind. 5206/02

-against-

Daniel Alvarez, Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about January 19, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court providently exercised its discretion in determining that substantial justice dictated denial of resentencing, given defendant's violent criminal history and poor prison disciplinary record (*see e.g. People v Rodriguez*, 86 AD3d 441 [2011], *lv denied* 17 NY3d 861 [2011]). Defendant's attempt to minimize his violent conduct is unpersuasive. Defendant also

argues that the underlying sentence was harsh and excessive to begin with. However, this Court rejected that argument on defendant's appeal from his conviction (46 AD3d 476, 477 [2007], *lv denied* 10 NY3d 807 [2008]).

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

ENTERED: APRIL 19, 2012

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6259N Princes Point, LLC, etc., Index 601849/08
Plaintiff-Appellant,

-against-

AKRF Engineering, P.C., et al.,
Defendants-Respondents.

Blank Rome LLP, New York (John J. Pribish of counsel), for appellant.

Seyfarth Shaw LLP, New York (Donald R. Dunn, Jr. of counsel), for AKRF Engineering, P.C., respondent.

Herrick, Feinstein LLP, New York (Scott E. Mollen of counsel), for Muss Development L.L.C., Allied Princes Bay Co., Allied Princes Bay Co. #2, L.P. and Joshua L. Muss, respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about March 24, 2011, which denied plaintiff's motion for leave to amend its complaint to add causes of action for fraud, promissory estoppel and prima facie tort, unanimously affirmed, without costs.

In this action arising from a real estate contract pursuant to which plaintiff agreed to purchase from defendants Allied Princes Bay Co. and Allied Princes Bay Co. #2, L.P. (Allied) a 23-acre parcel of waterfront property that had previously been listed by the Department of Environmental Conservation as a hazardous waste site, a disagreement occurred over the propriety of the shoreline revetment seawall, an issue which delayed

obtaining various development approvals and forestalled the contract's closing. Plaintiff commenced the instant action asserting causes of action for fraud against defendant AKRF Engineering, P.C., the company that constructed the revetment, negligent misrepresentation against Allied and AKRF, and specific performance of the June 2004 contract, as well as fraud in the inducement and rescission of a March 2006 amendment to the contract, against Allied.

Plaintiff's motion to amend the complaint to add additional causes of action was properly denied. Plaintiff's claims for promissory estoppel and fraud relating to the June 2004 contract fail since, pursuant to the contract, the property was being purchased "AS IS . . . AND WITH ALL FAULTS," and plaintiff was relying solely on its own inspections of the property. Thus, plaintiff accepted all defects in the premises and was not relying on any assurances made by defendants as to the condition of the property (*see Barnes v Gould,* 83 AD2d 900 [1981], *affd* 55 NY2d 943 [1982). In addition, the proposed promissory estoppel claim is deficient because the contract included a clause stating that it represented the entire understanding between the parties (*see Fariello v Checkmate Holdings, LLC*, 82 AD3d 437, 438 [2001]).

Furthermore, the new damages sought, consequential and

punitive, are unavailable to plaintiff on the claims asserted. Damages for fraud are to compensate plaintiffs for what they lost, "'not to compensate them for what they might have gained'" (*Starr Found. v American Intl. Group, Inc.*, 76 AD3d 25, 27 [2010], quoting *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]), and punitive damages are not warranted since plaintiff has not alleged wrongdoing evincing a high degree of moral turpitude that demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478 [2007]).

Plaintiff failed to plead facts that are sufficient to support a cause of action for prima facie tort because the allegations do not establish that defendants' purportedly tortious conduct was motivated by an otherwise lawful act performed with the intent to injure or with a "disinterested malevolence" (*see Curiano v Suozzi*, 63 NY2d 113, 117 [1984]; *Kleinerman v 245 E. 87 Tenants Corp.*, 74 AD3d 448 [2010]). Plaintiff's allegation of malevolence is contrary to its allegation concerning defendants' alleged profit motives (*see Meridian Capital Partners, Inc. v Fifth Ave. 58/59 Acquisition Co. L.P.*, 60 AD3d 434 [2009]).

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

> The Decision and Order of this Court entered herein on December 8, 2011 is hereby recalled and vacated (*see* M-50 decided simultaneously herewith).

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

ENTERED: APRIL 19, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6906 The People of the State of New York, Respondent, Ind. 3884/08

-against-

Kahree Frye, Defendant-Appellant.

Stanley Neustadter, Cardozo Criminal Appeals Clinic, New York (Jeremy Gutman of counsel), for appellant.

Kahree Frye, appellant pro se.

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered April 7, 2009, convicting defendant, after a jury trial, of attempted murder in the second degree (five counts), assault in the first degree (five counts), and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years, unanimously affirmed.

The court properly admitted an incriminating letter, since there was adequate circumstantial proof that defendant was the source of the letter (*see People v Hamilton*, 3 AD3d 405 [2004], *mod on other grounds* 4 NY3d 654 [2005]). The contents and context of the letter strongly indicated that it was written by defendant, and the letter was very similar in content to another letter in evidence that was undisputedly in defendant's

handwriting. The issues raised by defendant went to the weight to be given by the jury to the letter, not its admissibility. In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's argument concerning the best evidence rule is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

We have considered and rejected defendant's pro se claims regarding alleged bolstering testimony. Defendant's remaining pro se claims are procedurally barred because they violate the terms of this Court's order authorizing a pro se supplemental brief (*see People v Hasanati*, 48 AD3d 208 [2008]).

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

ENTERED: APRIL 19, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7032-
7033-
7034 Index 18006/05

Narcisa San Andres,
Plaintiff-Respondent-Appellant,

-against-

1254 Sherman Ave. Corp., et al.,
Defendants-Respondents-Appellants,

Eltech Industries, Inc.,
Defendant-Appellant-Respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Joseph P. Wodarski and Deborah J. Denenberg of counsel), for appellant-respondent.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for Narcisa San Andres, respondent-appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Stephen J. Molinelli of counsel), for 1254 Sherman Ave. Corp. and Dougert Management Corp., respondents-appellants.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered November 2, 2009, which granted defendants 1254 Sherman Avenue Corp. and Dougert Management's (collectively, Sherman) motion for summary judgment dismissing the complaint as against them, and denied defendant Eltech Industries, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to grant Eltech's motion, and otherwise affirmed, without costs. Order, same court and Justice, entered July 8, 2010, which, upon reargument, granted

Sherman's motion for summary judgment dismissing Eltech's cross claims as against it and for summary judgment on its indemnification claims against Eltech, unanimously modified, on the law, to deny the motion as to the indemnification claims against Eltech, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about January 14, 2011, which, upon plaintiff's and Eltech's motions to resettle the January 8, 2010 order, denied Sherman's motion for summary judgment dismissing the complaint as against it to the extent the complaint alleges that Sherman is vicariously liable for Eltech's acts, unanimously reversed, on the law, without costs, and the motions to resettle denied.

Plaintiff alleges that she tripped and injured her knee as she entered an elevator that had stopped “a little bit” or approximately four inches higher than the floor. Plaintiff did not notice that the elevator had misleveled before she fell and did not report the incident to Sherman. While she states that there was water on the floor both outside and inside the elevator, as though someone had dropped something from a water bottle, she claims that the water did not contribute to her fall. Plaintiff also alleges that as she attempted to exit the elevator as the doors were slowly closing, one of the doors hit her knee again. Plaintiff did not try to stop the door from closing and

she did not feel any pain that was different from the pain she felt when she first fell.

Sherman established prima facie that it neither created nor had actual or constructive notice of the alleged defect in the elevator's doors or leveling system (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 713-714 [2005]). Sherman's superintendent testified that he never noticed a misleveling condition during his daily walkthroughs, never received any complaints about misleveling, and never reported a misleveling condition to Eltech. Sherman's property manager testified that he never saw the elevator mislevel during his weekly inspections. The property manager received calls informing him that the elevator was out of service, but he did not recall any misleveling complaints and never reported a misleveling condition to Eltech before plaintiff's accident.

In opposition, plaintiff failed to raise an issue of fact (*see Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 459 [2011], *lv denied* 17 NY3d 708 [2011]; *Singh v United Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272, 276 [2010]). Her assertion that she overheard, as she passed by, snippets of complaints made to the building superintendent by unidentified neighbors is hearsay and therefore insufficient alone to defeat summary judgment (*see Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569, 571 [2010];

Saffore v Fasinro, 59 AD3d 288 [2009]). Her testimony that she had observed the elevator mislevel in the past also fails to raise an issue of fact because she admittedly did not report her observation to defendants (*see Narvaez v New York City Hous. Auth.*, 62 AD3d 419 [2009], *lv denied* 13 NY3d 703 [2009]). Sherman's property manager's testimony that the elevator was not always perfectly flush but was "within a couple of centimeters . . . less than an inch" did not establish that Sherman had notice of the alleged four-inch misleveling condition claimed by plaintiff.

Eltech met its prima facie burden with evidence that it had not received any misleveling complaints from Sherman and that no problems relating to misleveling were indicated in the inspection and service records it kept for the one-year period preceding the accident (*see Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]). In opposition, plaintiff failed to failed to raise an issue of fact by presenting evidence that there had been a misleveling problem before her accident (*see Meza v 509 Owners LLC,* 82 AD3d 426 [2011]). The affidavit by plaintiff's expert, who did not inspect the elevator and relied in part on plaintiff's hearsay testimony, was insufficient to raise a triable issue of fact whether Eltech failed to use reasonable care to discover and correct a condition it ought to have found; his conclusory

assertion that the misleveling on the date of the accident was caused by negligent maintenance is based on speculation (*see Parris v Port of N.Y. Auth.*, 47 AD3d 460 [2008]).

Plaintiff's reliance on the doctrine of res ipsa loquitur is misplaced under the circumstances (*see Meza,* 82 AD3d at 427; *Cortes v Central El., Inc.*, 45 AD3d 323 [2007]).

In light of the dismissal of the complaint as against Eltech, Sherman’s common law indemnification claim against Eltech must also be dismissed.

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

ENTERED: APRIL 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Freedman, Manzanet-Daniels JJ.

7124 The People of the State of New York, Respondent, Ind. 6192/09

-against-

Michael Gerard, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Juan M. Merchan, J. at plea and sentencing), rendered September 14, 2010, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of eight years, unanimously reversed, on the law, defendant's suppression motion granted, and the indictment dismissed.

It was a permissible intrusion for the investigating officer to have approached defendant to ask him whether he was carrying a weapon and whether he was all right, based upon his founded suspicion that criminality was afoot, derived from (1) defendant's presence in a "drug-prone and gun-prone" location at approximately 2:45 A.M., (2) the weighted-down appearance of the left side of defendant's unzipped jacket; (3) defendant's change

in course after he noticed the police officers, in which he made a hard left turn, quickened his pace and hugged the building line, with the weighted side of his coat very close to the wall; (4) defendant's act of blading his body towards the wall as the investigating officer neared, i.e. turning his shoulders so as to use the wall to shield his weighted-down pocket; (5) the bulge in defendant's weighted-down pocket; and (6) defendant speaking into a phone in a fast cadence (*see People v Rodriguez*, 207 AD2d 669 [1994], *lv denied* 84 NY2d 939 [1994]; *People v Niles*, 237 AD2d 537 [1997], *lv denied* 90 NY2d 861 [1997]). "Although each factor, standing alone, could be susceptible to an innocent interpretation, a view of the entire circumstances" gave the officer a founded suspicion that criminality was afoot, which invoked the common-law right to inquire (*see People v Evans*, 65 NY2d 629 [1985]). However, the officer's level of suspicion was not elevated to a reasonable suspicion that defendant was involved in a felony or misdemeanor, as required for a stop and frisk, when defendant turned his left shoulder towards the officer, stated unresponsively that he did not have any drugs on him, continued to talk on his cell phone, and attempted to block the officer's hand as the officer reached towards his pocket to feel the pocket bulge (*see People v Hollman*, 79 NY2d 181, 185 [1992]; *People v Samuels*, 50 NY2d 1035, 1037 [1980], *cert denied*

449 US 984 [1980]; *People v Madera*, 189 AD2d 462, 467-468 [1993], *affd* 82 NY2d 775 [1993]). Defendant was entitled to engage in an "immediate, spontaneous and proportionate" reaction to the seizure that was illegal because it was not based on reasonable suspicion (*see People v Felton*, 78 NY2d 1063 [1991] [internal quotation marks omitted]).

On appeal, the People argue that, even in the absence of reasonable suspicion, the officer's act of reaching out to touch the bulge was permissible as a self-protective minimal intrusion within the scope of a common-law inquiry (*see e.g. People v Chin*, 192 AD2d 413 [1993], *lv denied* 81 NY2d 1071 [1993]). This argument is unpreserved, because at the suppression hearing the People contended only that the frisk was supported by reasonable suspicion. Furthermore, the hearing court did not deny suppression on that ground, and since the issue was not determined adversely to defendant, we may not reach it on appeal

(see CPL 470.15[1]; *People Concepcion*, 17 NY3d 192, 194-195 [2011]; *People v Santiago*, 91 AD3d 438, 439 [2012]).

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

ENTERED: APRIL 19, 2012

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Román, JJ.

5988- Index 25110/01
5989-
5990 Stephanie Scalisi, etc.,
et al.,
Plaintiffs-Appellants-Respondents,

-against-

Martin Oberlander, et al.,
Defendants-Respondents,

Eugene Sidoti, Sr., M.D.,
Defendant-Respondent-Appellant.

_____

Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier of counsel), for appellants-respondents.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for respondent-appellant and Lenore S. Katkin, M.D. and Marian Lombardi, respondents.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for Martin Oberlander; Monica Oberlander; Joshua L. Waldman, M.D.; Jordan J. Hirsch, M.D.; Kay D. Anderson, M.D. and Samuel G. Oberlander, M.D. & Jordan Hirsch, M.D., L.L.P., respondents.

Edward J. Guardaro, Jr., White Plains, for The Jack D. Weiler Hospital of the Albert Einstein College of Medicine, respondent.

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Judgment, Supreme Court, Bronx County (Barry Salman, J.), entered October 1, 2010, modified, on the law, vacated as to defendants Katkin, Oberlander and Lombardi and defendant hospital, the complaint reinstated as against said defendants, and otherwise affirmed, without costs. Plaintiff's appeal from order, same court and Justice, entered August 25, 2010,

dismissed, without costs, as subsumed in the appeal from the judgment. The foregoing order, insofar as appealed from by defendant Sidoti, affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Leland G. DeGrasse
Sallie Manzanet-Daniels
Nelson S. Román, JJ.

5988-
5989-
5990
Index 25110/01

_____x

Stephanie Scalisi, etc., et al.,
Plaintiffs-Appellants-Respondents,

-against-

Martin Oberlander, et al.,
Defendants-Respondents,

Eugene Sidoti, Sr., M.D.,
Defendant-Respondent-Appellant.

_____x

Plaintiffs appeal from a judgment of the Supreme Court, Bronx County (Barry Salman, J.), entered October 1, 2010, dismissing the action against all defendants except Eugene Sidoti, Sr., M.D., and bringing up for review an order, same court and Justice, entered August 25, 2010, to the extent it granted said defendants' motions for summary judgment dismissing the complaint, and plaintiffs and defendant Sidoti appeal from the foregoing order.

Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier, Thomas A. Moore and Norman Bard of counsel), for appellants-respondents.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for respondent-appellant and Lenore S. Katkin, M.D. and Marian Lombardi, respondents.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg and Sean F.X. Dugan of counsel), for Martin Oberlander; Monica Oberlander; Joshua L. Waldman, M.D.; Jordan J. Hirsch, M.D.; Kay D. Anderson, M.D. and Samuel G. Oberlander, M.D. & Jordan Hirsch, M.D., L.L.P., respondents.

Edward J. Guardaro, Jr., White Plains, and Wilson, Elser, Moskowitz , Edelman & Dicker, LLP, White Plains, for The Jack D. Weiler Hospital of the Albert Einstein College of Medicine, respondent.

SALLIE MANZANET-DANIELS, J.

In December 1997, plaintiff mother, age 27 and pregnant with her first child, came under the care of defendant Dr. Martin Oberlander and his obstetrical group. On August 18, 1998, four days past her due date, plaintiff mother called the obstetric practice, concerned with a perceived decrease in fetal movement. She was instructed to go to the hospital, where she underwent several tests, the results of which were unremarkable. On August 20th, six days past her due date, plaintiff mother underwent a sonogram which showed mild left hydrocephalus with an incidental finding of mild left ventriculomegaly.[1] The nonparty perinatologist who reviewed the films, Dr. Musalli, recommended follow-up to monitor the hydrocephalus, but noted that delivery was not indicated unless the hydrocephalus was "progressive."

A follow-up sonogram four days later, on August 24, showed "mild dilation of the intracranial ventricular system (lateral and third ventricles)," with otherwise normal-appearing symmetric intracranial structures.[2] It is heavily disputed by plaintiffs'

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[1]Ventriculomegaly is a brain condition that occurs when the lateral ventricles become dilated.

[2]Dr. George Mussalli, the attending physician at the maternal fetal medicine unit at the hospital who interpreted the sonogram, states that it was performed on August 24th, not August 22nd, the date listed on the report. He explained that the maternal fetal unit was closed on August 22nd, a Saturday.

and defendants' medical experts as to whether these findings – a movement of the condition from the left lateral ventricle to both lateral ventricles and the third ventricle – were indicative of progressive hydrocephalus.[3]

Plaintiff mother was admitted to the hospital on August 26, 1998, for induction of labor. During labor she experienced variable decelerations consistent with compression of the fetal head. She delivered the infant plaintiff vaginally, after a second stage of labor (pushing) lasting more than three hours.

The infant plaintiff was born at 5:44 P.M. on August 27th. The baby weighed 6 pounds, 10½ ounces, and had Apgar scores of 9 at one minute and 9 at five minutes. The infant's head circumference at birth was 36 cm. A hospital pediatrician, identified as Dr. Vega, was present at the delivery. He noted the results of the August 20th sonogram in the chart, but made no reference to the subsequent sonogram on August 24th. Similarly, the history of plaintiff mother taken by the third-year hospital resident makes no reference to the second sonogram.

The hospital's perinatology unit created a card instructing

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[3]Plaintiff mother's obstetrician agreed that the phrasing of the August 22nd sonogram report would appear to indicate a progression of the hydrocephalus from one ventricle to three ventricles, but he would not "assume" this was the case until confirmed by the hospital perinatologist.

the labor and delivery staff that the mother had been seen by the maternal fetal assessment team and that the infant required a neurology follow-up after delivery for mild hydrocephalus. This card was never placed in the infant plaintiff's chart, despite express instruction to "PLEASE ATTACH THIS CARD TO THE INFANT'S CHART!" Neither Dr. Vega, nor the hospital neonatologist who reviewed the infant plaintiff's history and examined her shortly after birth, nor the infant plaintiff's private pediatrician, referred the infant for a neurological evaluation.

A sonogram of the infant plaintiff's head was performed on August 28th. However, the sonogram was not read until August 31st – after the infant plaintiff had already been discharged.

The report, dated September 1, 1998, indicated hydrocephalus of the left and right ventricles and the third ventricle, and in addition a "suspicio[n]" of a grade II intraventricular hemorrhage (IVH), a condition that may be associated with a traumatic delivery. The report states, inter alia:

> "The lateral ventricles are enlarged, including the atria, occipital horns and body. The third ventricle is also dilated. In the lateral ventricle there is echogenic focus suspicious for intraventricular hemorrhage."

Dr. Lenore Katkin, the infant plaintiff's private pediatrician, examined the infant plaintiff in the hospital prior

to discharge. She testified that she read the infant's chart prior to the examination and was aware that sonograms had been performed both prenatally and postnatally to assess the infant plaintiff's condition. Dr. Katkin conceded that she had not seen the report of the postnatal sonogram when she discharged the infant plaintiff. At the time she examined the infant plaintiff, she did not know the degree of the infant's hydrocephalus, or whether the condition had changed in any way since the prenatal sonograms. She testified that upon discharge the infant's head was not "visibly" enlarged, but conceded that it was impossible to determine, upon physical examination, whether the ventricles were distended in any way.

Dr. Katkin testified that she did not contact the department where the sonogram had been performed to see whether the results were ready since she had a "verbal report" that the postnatal sonogram showed no change. Dr. Katkin was unaware that the postnatal sonogram showed changes suspicious for IVH; she testified that this finding would not have factored into her evaluation of the infant, even though it was known that the infant had hydrocephalus. Plaintiff mother was told to return to the pediatrician in two weeks for a routine appointment, and to schedule a CT scan in one month's time.

The infant plaintiff was next seen by Dr. Sidoti, Dr.

Katkin's associate, on September 10, 1998. Dr. Sidoti examined the infant plaintiff and noted a 3 cm increase in the child's head circumference. This measurement placed the infant above the 95th percentile. Dr. Sidoti wrote that prenatal and postnatal ultrasounds indicated "possible" mild bilateral and third ventricle hydrocephalus, and his impression was a well baby with questionable hydrocephalus. No mention was made of the IVH findings, despite the fact that his office records contained the September 1st sonogram report.

Dr. Sidoti's plan included a possible repeat ultrasound and CT scan and a neurological evaluation in the event head circumference increased or the ventricles appeared larger. He did not, at that time, refer the infant plaintiff for a neurological examination.

When a CT scan was finally performed, on September 24th, it showed "moderate-to-severe enlargement of the lateral ventricles, the third ventricle and the fourth ventricle" and recommended an MRI "to evaluate for prior intraventricular hemorrhage if this was not diagnosed in the past." The impression was

> "1) Dilation of the entire ventricular system, most consistent with communicating hydrocephalus. Normal attenuation in the periventricular white matter suggests that the hydrocephalus is compensated. MRI may be helpful to evaluate for prior intraventricular hemorrhage if this was not

diagnosed in the past.

"2) Cerebellar hemispheric asymmetry, variant vs. old right cerebellar infarct."

Dr. Sidoti referred the infant plaintiff to a pediatric neurologist, nonparty neurologist Dr. Karen Ballaban-Gil, who examined the infant plaintiff that day. In a letter to Dr. Sidoti, the neurologist reported a head circumference of 41.5 cm, representing a rapidly accelerating growth on the order of 6 cm in the first month of life, as compared to the normal rate of about 2 cm. The neurologist in addition noted significant hydrocephalus in the lateral third and fourth ventricles. The neurologist referred the infant plaintiff to a neurosurgeon for immediate insertion of a ventriculoperitoneal (VP) shunt to decrease the pressure on the infant's brain. The shunt was revised in October 1998, and again in June 1999.

In August 1999, the infant plaintiff began having seizures. In late 2000, the infant plaintiff's neurosurgeon reported that imaging studies showed findings consistent with a Dandy-Walker variant, a congenital condition characterized by malformation of the third ventricle and changes in the posterior fossa (base of the skull). In 2004 and 2005, the infant plaintiff underwent further procedures resulting in insertion of a new shunt.

At eight years of age, the infant plaintiff was not toilet

trained, could not dress herself, could walk only short distances with an unsteady gait, could not run or jump, and required orthotics and a custom stroller/wheelchair to ambulate. She is severely mentally retarded, with limited language abilities.

Plaintiffs commenced this action alleging that the infant plaintiff's injuries had been caused, inter alia, by the failure of the obstetrician defendants to diagnose the infant plaintiff's progressive hydrocephalus and by the delivery of the infant vaginally, rather than by performance of a caesarean section; by the failure of the pediatrician defendants to monitor the infant plaintiff for signs of both hydrocephalus and IVH, and to promptly refer the infant plaintiff to a neurologist for follow-up treatment and testing; and by the failure of the hospital to recommend delivery via c-section, to refer the infant for neurological follow-up, and to read critical imaging studies until four days following the infant plaintiff's discharge from the hospital.

Defendant hospital moved for summary judgment, relying, inter alia, on the expert affidavit of Dr. George Mussalli. Dr. Mussalli opined that delivery was not indicated based on a diagnosis of mild hydrocephalus, unless it was determined on follow-up that the hydrocephalus was "progressive," i.e., the lateral ventricle was increasing in size and the fetal head was

larger than normal. He opined that the second postnatal sonogram, on August 24th, showed no progression of the infant plaintiff's hydrocephalus. He stated that the left ventricle remained only mildly dilated, measuring only 1.4 cm, whereas it was noted to be 1.8 cm four days earlier. Dr. Mussalli opined that the mild dilation of the third ventricle did not change the diagnosis of mild hydrocephalus. He further opined, upon a review of both prenatal films, that there had been no progression in the hydrocephalus.

The obstetrician defendants moved for summary judgment, relying on the testimony of Dr. Waldman and the expert affidavit of Dr. Gary Mucciolo, an OB/GYN. Dr. Mucciolo opined that the obstetrician defendants did not depart from good and accepted medical practice in the care of plaintiff mother and the unborn infant. It was his opinion, within a reasonable degree of medical certainty, that since there was no evidence of progression in the infant plaintiff's hydrocephalus, that defendants were correct in their assessment that a c-section was not indicated or necessary. He opined that the decision to forego a c-section was not the proximate cause of the infant's developmental delays and neurological impairments. Dr. Mucciolo expressed no opinion concerning the cause of the infant plaintiff's neurological deficits.

The pediatrician defendants moved for summary judgment, relying, inter alia, on the testimony of Dr. Katkin, the affidavit of Dr. Sidoti, and the expert affidavit of Dr. Leon Zacharowicz, a board-certified neurologist with a special qualification in child neurology. Dr. Katkin testified that hydrocephalus does not pose a short-term risk to a newborn. She stated that intervention is indicated when the cause of the hydrocephalus is known, or when there is a major thinning of the brain cortex or a problem with brain function. Dr. Katkin testified that most cases of non-progressive hydrocephalus resolve spontaneously, and that only a small percentage require treatment. Dr. Katkin testified that even had she been told about a possible IVH, the information would not have changed her evaluation or treatment of the infant.

Dr. Sidoti averred that the care provided by Dr. Katkin and himself did not deviate from the accepted standard of care. Dr. Sidoti stated that the results of the August 28th sonogram did not change the plan of action regarding follow-up care for the infant. Dr. Sidoti averred that when he examined the infant plaintiff on September 10th, he was aware of the results of the August 20th and 24th sonograms showing "mild dilation of the intracranial ventricular system (lateral and third ventricles)," consistent with mild communicating hydrocephalus. On the date of

the examination, the infant plaintiff's head circumference measured 38 cm (representing a 3 cm growth in 11 days). Dr. Sidoti opined that it was within the standard of care not to send the infant plaintiff to a neurologist on September 10, 1998, since it was appropriate to monitor head circumference and/or obtain a CT scan before referring the infant to a neurologist for further evaluation. Dr. Sidoti explained that a newborn's skull is not fused and that open fontanelles allow expansion, which would limit any damage caused by mild hydrocephalus. Dr. Sidoti expressed no opinion concerning the cause of the infant plaintiff's neurological deficits.

Dr. Zacharowicz opined that the pediatrician defendants had not departed from the standard of care in their treatment of the infant plaintiff, and that the treatment rendered by the pediatrician defendants had not caused the infant plaintiff's alleged injuries. Dr. Zacharowicz opined that the August 24th sonogram was consistent with "mild communicating hydrocephalus," and that the infant plaintiff was born on August 27th with congenital mild hydrocephalus. He opined that the infant plaintiff's neurological examination shortly after birth on August 27, 1998 was normal and did not suggest a need for "urgent intervention." He further opined that it was proper and within the standard of care to monitor head growth before referral to a

neurologist, noting that it was possible for the hydrocephalus to become static over the course of a few weeks. He opined that it was within the standard of care and not improper to wait for a CT scan, since serial measurements of head circumference and clinical examinations are of greater value than brain imaging in most cases.

He further noted that upon admission to the hospital for insertion of the shunt the infant plaintiff's fontanelles were "full," but not bulging (the latter an indication of increased intracranial pressure). He opined that it was within the standard of care not to shunt immediately following birth because the infant's skull bones are not fused and the brain and fluid can expand without damage. Dr. Zacharowicz noted that the infant plaintiff's hydrocephalus was consistent with a variant of Dandy-Walker syndrome. Dr. Zacharowicz opined that Dandy-Walker "may" have been the cause of the hydrocephalus and the subsequent claimed injuries, and therefore, that nothing done or not done by the pediatricians could have changed the outcome. Dr. Zacharowicz expressed no opinion concerning whether the postnatal radiographic evidence demonstrated a progression of the infant plaintiff's hydrocephalus, and did not express an opinion concerning the cause of the infant plaintiff's neurological deficits other than his supposition that Dandy-Walker "may" have

been the cause of her hydrocephalus and thus of her subsequent claimed injuries.

Plaintiffs opposed the various motions for summary judgment. Plaintiffs' expert obstetrician opined that the hospital's perinatologist should have recommended a c-section, noting that hydrocephalus or ventriculomegaly requires an "atraumatic delivery," since trauma can exacerbate hydrocephalus. The expert opined that regardless of whether or not the infant's hydrocephalus had been determined to be progressive, the finding of ventriculomegaly or hydrocephalus in a post-date infant requires delivery, specifically, delivery by the atraumatic mode of c-section.

Plaintiffs' obstetrical expert opined that the August 24th postnatal sonogram showed a progression of the hydrocephalus from one to three ventricles, making it even more critical to admit the patient and deliver the infant via c-section. Plaintiffs' expert opined that Dr. Oberlander departed from standards of good and accepted obstetrical practice by following the recommendations of the hospital's perinatologists and in not performing a c-section to reduce the risk of atraumatic delivery in an infant with documented ventriculomegaly, and further violated the standard of care by failing to abandon the delivery

plan once the second stage of labor became prolonged[4] and the fetus exhibited multiple variable decelerations indicative of fetal head compression. Plaintiffs' obstetrical expert opined, within a reasonable degree of medical certainty, that the delivery was traumatic, and that the infant sustained head trauma during delivery that contributed to her injuries. Plaintiffs' expert cited as evidence of the traumatic delivery, inter alia, the variable decelerations, the fact that the baby's head measured 36 cm in the delivery room but 35 cm two days later, indicating swelling attributable to trauma during the delivery, and the impression on the postnatal sonogram of grade II intraventricular hemorrhage.

Plaintiffs' pediatric expert opined, with a reasonable degree of medical certainty, that the infant plaintiff had sustained severe damage as a result of hydrocephalus in the month after birth. The expert opined that since the hydrocephalus went untreated and continued to progress during that time, expanding ventricles and increased intracranial pressure caused damage to the surrounding brain tissue.

Plaintiffs' pediatric expert further opined that the infant plaintiff had sustained head trauma during labor and delivery,

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[4]The second, or "pushing" stage of labor lasted 3 hours and 19 minutes.

citing, inter alia, the numerous variable decelerations, and the finding of IVH, which could have exacerbated pre-existing hydrocephalus.

Plaintiffs' expert opined that the hospital's pediatrician and neonatalogist should have immediately ordered a pediatric neurology or neurosurgery consult, since hydrocephalus is an "emergent" condition that can cause brain damage and may require prompt remedial treatment. Plaintiffs' expert opined, with a reasonable degree of medical certainty, that had a neurologist or neurosurgeon been consulted, the baby would not have been discharged on August 29th, and would instead have been kept in the hospital for further observation and evaluation of her condition, leading in turn to earlier insertion of a shunt. Plaintiffs' expert opined that the prenatal sonograms indicated a progression of the hydrocephalus to the right and third ventricles before birth, and the postnatal sonogram indicated that she continued to have hydrocephalus in three ventricles, no longer described as "mild." The impression of a grade II IVH created a further risk of worsening of the hydrocephalus. The expert described the growth in the infant plaintiff's head circumference in the two-week period prior to the September 10th office visit as "extraordinary."

Plaintiffs' pediatric expert further opined that hospital

staff departed from acceptable medical practice in failing to attach to the newborn chart the card generated by the maternal fetal medicine unit indicating the need for neurologic follow-up. The expert opined that the hospital departed from accepted practice in failing to read the sonogram for a four-day period, noting that hydrocephalus is an emergent condition that can be extremely dangerous and may require prompt medical treatment.

Plaintiffs' expert opined that the report of the August 28th sonogram should have been in the chart prior to discharge, and that Dr. Katkin should not have accepted an oral report. The expert opined that the standards of practice required that Dr. Katkin obtain a formal reading of the sonogram before discharging the infant, and to obtain a consultation from a pediatric neurologist or neurosurgeon prior to discharge. Plaintiffs' expert opined that Dr. Katkin should have seen the infant every two or three days, and that waiting a month for a CT scan was "grossly improper."

Plaintiffs' pediatric expert further opined that it was a departure for Dr. Sidoti not to order an immediate CT scan and neurologic evaluation on September 10th, and to wait an additional two weeks before referring the infant plaintiff to a neurologist. Plaintiffs' expert noted that Dr. Sidoti was aware of the results of the August 28th sonogram (showing progression

of the hydrocephalus, as well as suspicion of a grade II IVH) and was aware that the infant plaintiff's head circumference had increased by 3 cm in just 11 days, yet declined to make the necessary referrals. Plaintiffs' expert opined, with a reasonable degree of medical certainty, that had Dr. Sidoti referred the infant for evaluation on September 10th, it would have been determined that her hydrocephalus was significantly progressing and required prompt insertion of a shunt to avoid brain damage.

Plaintiffs' expert neurologist opined, with a reasonable degree of medical certainty, that the infant plaintiff had sustained severe brain damage attributable to hydrocephalus in the month after birth. Since the hydrocephalus went untreated and continued to progress during that time, expanding ventricles and increased intracranial pressure caused damage to surrounding brain tissue. Plaintiffs' neurologist stated that the prenatal and postnatal sonograms showed gradually progressing enlargement of the ventricular system, and that the postnatal sonogram showed a grade II IVH not present on either of the prenatal sonograms. He opined that this IVH was sustained during labor and delivery, further noting that IVH can both cause hydrocephalus and exacerbate preexisting hydrocephalus. The neurologist noted that when the infant plaintiff was examined on September 10th, her

head circumference had increased more than 3 cm in the 11 days since her discharge from the hospital, which he characterized as an “extraordinarily rapid rate of growth,” indicative of a significant progression of the hydrocephalus during the neonatal period. He noted that the September 24th CT scan showed “severe” hydrocephalus.

Plaintiffs’ expert opined, with a reasonable degree of medical certainty, that the radiological and physical findings demonstrated continually progressing hydrocephalus from August 20th through September 24th that was congenital in origin and exacerbated by IVH, and that this untreated hydrocephalus caused severe damage to the infant plaintiff’s brain. The expert noted that subsequent medical records indicate that the infant’s neurologic condition was carefully monitored from September 24, 1998 onward, and that although the infant required several shunt revisions, she never again suffered a degree of hydrocephalus significant enough to damage the brain.

The expert opined further that the baby had sustained additional head trauma during the labor and delivery which contributed to the IVH and exacerbation of her hydrocephalus. The expert opined that the infant should have been evaluated by a neurologist after delivery and should not have been discharged until such evaluation had been obtained. The expert opined that

had the infant been so monitored, it would have been determined within a matter of days that her hydrocephalus was progressing at a dangerous rate, and that insertion of a shunt was necessary. He noted that the rapid rate of head growth, alone, would have been "patent" after a few days, and additional imaging studies would have confirmed that the ventricles were continuing to expand. Plaintiffs' neurologist opined that Dr. Sidoti should have referred the infant to a neurologist on September 10th, when he saw that her head circumference had increased by over 3 cm and was then above the 95th percentile. The neurologist stated that severe hydrocephalus can cause damage to the white matter of the brain without bulging fontanelles, contrary to the assertion of defense expert Dr. Zacharowicz. The expert noted that the September 24th CT showed marked expansion of the ventricles with compromise of the white matter. Finally, the neurologist concluded that the finding of a Dandy-Walker variant was "irrelevant" to the infant plaintiff's injuries, and, in any event, that the infant did not have the cerebellar attributes of a Dandy-Walker malformation. Moreover, the expert opined that hydrocephalus accompanying Dandy-Walker syndrome or variant is treatable, and that insertion of a shunt would have prevented the infant plaintiff's brain damage.

Plaintiffs' expert neuroradiologist opined that the August

24th sonogram demonstrated dilation and increases in the sizes of the lateral ventricles and third ventricle as compared to the August 20th sonogram, and that these findings denoted a progression of the hydrocephalus. The radiologist found that the August 28th postnatal sonogram demonstrated an increase in the hydrocephalus as compared to the prenatal sonograms, and that the postnatal sonogram "clearly" showed an intraventricular hemorrhage grade II, consistent with head trauma sustained during a vaginal delivery. The expert opined that good and accepted practice, in the case of an infant with hydrocephalus, a potentially emergent condition that may require prompt treatment, necessitated reading and reporting of the sonogram's results within 24 hours.

The motion court dismissed the complaint as against all defendants with the exception of Dr. Sidoti. The court reasoned that the decision to deliver vaginally, while made in consultation with hospital perinatologists, was ultimately that of plaintiff mother's private physician. The court noted, in any event, that the evidence showed that a vaginal delivery was not contraindicated in cases of hydrocephalus. The court found no indication that hospital staff who performed and read the sonograms had failed to communicate with the referring doctors or that a delay in communicating the results of the sonograms would

have made any difference in the treatment of the infant plaintiff. The court reasoned that given the infant's normal status at birth, there was "no evidence" to support the claim that the infant should have been further monitored and shunted earlier. The court stated that even assuming, arguendo, that the hospital had departed from accepted medical practice, there was no evidence that the congenital hydrocephalus was more than mild at the time of discharge, even if it had progressed, and no evidence that the condition had caused brain damage by the time of discharge from the hospital.

The court found that the obstetrician defendants were entitled to summary judgment essentially for the same reasons, and that Dr. Katkin was entitled to summary judgment since at the time of discharge the infant plaintiff had a normal examination. The court, however, found a triable issue of fact as to whether Dr. Sidoti had departed from accepted medical practice, citing the fact that by September 10th, the infant plaintiff's head had become "pronouncedly" large, in the 95th percentile.

The court took issue with the assumption of plaintiffs' experts that damage had occurred during the first month of life, stating that this conclusion ignored evidence of repeated shunt failures.

We now modify. A defendant in a medical malpractice action

establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff he or she did not depart from good and accepted medical practice or that any such departure was not the proximate cause of the plaintiff's alleged injuries (*see Thurston v Interfaith Med. Ctr.*, 66 AD3d 999 [2009]). Once a defendant doctor meets his or her burden, the plaintiff must rebut defendant's 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.*).

In reaching its conclusion that plaintiffs' submissions failed to raise a triable issue of fact as to the negligence of the hospital, the obstetrical defendants, and the pediatric defendants other than Dr. Sidoti, the motion court improperly engaged in fact-finding, discounted the affidavits of plaintiffs' experts, and substituted its own medical judgment. The motion court concluded that the infant plaintiff's brain damage could not have occurred during the first month of life since she was not exhibiting signs of alleged distress, and that neurological damage occurred at some later, unspecified point when the infant's shunt malfunctioned.

However, plaintiffs' experts opined that since no further significant increases in ventricular size or intracranial

pressure occurred after the first month of life, the damage had already been done – thus ruling out any subsequent alleged shunt malfunction as the cause of the infant plaintiff's brain damage. The infant plaintiff's neurological sequelae are severe, and are not the inevitable outcome of having a congenital variant of Dandy-Walker.[5] It was therefore medically reasonable for plaintiffs' experts to arrive at the conclusion that these sequelae are in significant part attributable to the actions of the various defendants in failing to recognize the signs of a progressive hydrocephalus, in failing to properly monitor an infant whose imaging studies showed both progressive hydrocephalus and possible IVH, and in discharging the infant without a plan for neurological follow-up, despite the objective, positive findings documented in the imaging studies. The motion court erroneously disregarded plaintiffs' experts' opinions on causation and engaged in improper fact-finding in concluding that defendants' actions had not contributed to her brain damage.

The motion court erred in making a factual determination

[5]The fact that the infant plaintiff may or may not have a variant of Dandy-Walker does not absolve defendants from failing to properly monitor and treat the hydrocephalus that is characteristic of the condition. Indeed, carrying this argument to its logical extreme, one might argue that a doctor can never be at fault for failing to treat a condition that he or she did not affirmatively cause. Yet the law recognizes malpractice for failure to act.

that brain damage occurred at some later, unspecified point in time, when the shunt is alleged to have "malfunctioned." Notably, not one defense expert makes this assertion.[6] Defendants' theory that brain injury occurred at some later point in time is predicated on the testimony of plaintiff mother and the operative reports of the neurosurgeon who placed the shunt. Yet nowhere in this testimony or in these reports does the mother or the neurosurgeon attribute the infant plaintiff's brain damage to alleged shunt malfunction. Indeed, the assessment of the neurosurgeon in the hospital record refers to the infant's "delayed development" and notes a "lack of association with shunt malfunction."

The motion court further erred in making a factual determination that the infant had never sustained an IVH because a cerebrospinal fluid sample taken at the time of the shunt

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[6]Defendants' experts, while opining that defendants' actions had not caused the infant plaintiffs' neurological deficits, expressed no opinion concerning the cause of the infant plaintiff's injuries. Dr. Zacharowicz came closest in stating that Dandy-Walker "may" have caused the infant's hydrocephalus and therefore her injuries, but made no attempt to pinpoint the period during which the infant plaintiff sustained injuries (whether by correlating such injuries to increases in intracranial pressure or otherwise), and did not affirmatively opine that she did indeed suffer from Dandy-Walker. In any event, whether or not Dandy-Walker is the cause of the infant plaintiff's hydrocephalus, defendants may still be liable for failing to properly monitor the condition.

insertion allegedly showed otherwise. The record contains no expert opinion that the fluid sample demonstrated that the infant plaintiff had not sustained an IVH a month earlier.

Similarly, the motion court found that a vaginal delivery was not contraindicated, yet plaintiffs' experts clearly opined that an atraumatic delivery was necessary because the infant plaintiff had hydrocephalus, whether characterized as progressive or not.

The motion court's opinion, while long, underscores the difficulties of courts grappling with complex medical evidence and trying to identify triable issues of fact, as opposed to propositions that lack medical foundation. In making this assessment, a motion court is not to substitute its own medical judgment for that of the parties' experts, or to surmise, as did the court here, that because the infant plaintiff appeared normal shortly after birth, she had not sustained a brain injury, or a severe enough injury, so as to result in the neurological sequelae she now exhibits today.

Plaintiffs' proofs showed that the infant plaintiff was diagnosed with mild hydrocephalus prior to birth, that the radiological evidence both before and shortly after birth indicates a progression of said condition (whether this was indeed the case is a matter for trial; it suffices, at this

stage, that there are conflicting medical opinions on the issue), that the results of critical imaging studies were not promptly read,[7] that hydrocephalus is an "emergent" condition that requires careful monitoring, and that failure to monitor the condition resulted in brain damage, damage that in this case was exacerbated by a possible grade II IVH.

The affidavits of plaintiffs' experts raise triable issues of fact as to whether the actions of the respective defendants caused or contributed to the infant plaintiff's brain damage. Plaintiffs' obstetrical expert opined that hospital perinatologists departed from the standard of care in failing to recommend a c-section for a post-due mother with an infant with hydrocephalus. The expert explained that an atraumatic delivery was required since trauma to the baby's head can exacerbate hydrocephalus. The expert further opined that the progressive nature of the hydrocephalus made it even more imperative to deliver the baby via c-section. The record showed that plaintiffs' private obstetrician formulated plans for high-risk patients in conjunction with hospital perinatologists, and that they relied on the perinatologists for advice, including how to

[7]It was not reasonable for the motion court to presume that because the infant plaintiff appeared "normal," the results of these studies were in some sense superfluous.

manage a delivery with hydrocephalus. The hospital perinatologists may thus be held liable for any negligence in their recommendations or in their reading of ultrasounds (*see Santos v Rosing*, 60 AD3d 500 [2009]; *see also Raptis-Smith v St. Joseph's Med. Ctr.*, 302 AD2d 246, 247 [2003]). Indeed, we have previously affirmed the denial of summary judgment in a case involving co-management between private obstetricians and perinatologists at the very same defendant hospital *(see Frye v Montefiore Med. Ctr.*, 70 AD3d 15 [2009]).

Plaintiffs' pediatric and neurological experts opined that the hospital departed from the standard of care by failing to order a neurologic or neurosurgical consultation for an infant with hydrocephalus, an emergent condition that can cause brain damage if not properly monitored and treated. Plaintiffs' expert opined that the hospital was negligent in failing to evaluate the infant and the relevant radiological studies prior to discharge. Experts similarly opined that the hospital departed from proper practice in failing to attach to the infant's chart the card calling for neurological follow-up after delivery. Thus, plaintiffs have adequately raised a triable issue of fact with respect to the negligence of defendant hospital in their treatment of the infant (*see Gerner v Long Is. Jewish Hillside Med. Ctr.*, 203 AD2d 60 [1994] [hospital concurrently liable with

private pediatrician for failing to properly diagnose and treat infant's jaundice where, inter alia, nurses failed to record any jaundiced condition, or make any reference to color, until the third day of life, even though the parents had complained to hospital personnel since the infant's birth; and the hospital laboratory did not timely report results nor timely carry out the pediatrician's orders for phototherapy]).

Plaintiffs' experts similarly raise a triable issue of fact as to whether departures by plaintiff's private obstetrician contributed to the infant plaintiff's brain damage. Plaintiffs' obstetrical expert opined, as discussed supra, that given the evidence of hydrocephalus in a post-term infant, plaintiffs' obstetrician should have performed an atraumatic c-section, rather than risk a vaginal delivery, which might exacerbate the infant's condition.

Finally, plaintiffs' experts raise a triable issue of fact as to whether the actions of pediatricians Dr. Katkin and Dr. Sidoti, in failing to recognize the radiographic evidence of a progression of the infant's condition, and in failing to promptly refer the infant for neurological consultation, contributed to the infant's brain damage. Plaintiffs' expert noted, inter alia, that Dr. Katkin discharged the infant plaintiff without first receiving a report of the formal reading of the postnatal

sonogram, instead relying on an "oral report" from an unspecified member of the nursery staff for this critical information. The expert explained that hydrocephalus can cause damage to the brain, even without bulging fontanelles. Plaintiffs' pediatric and neurological experts further opined that Dr. Sidoti should have referred the infant for a neurological evaluation on September 10th, after documenting that the infant plaintiff's head circumference had grown 3 cm in 11 days' time.

Since an issue of fact exists as to whether Dr. Lombardi and Drs. Sidoti and Katkin were partners in a general partnership, the complaint should be reinstated as against the Estate of Dr. Lombardi (*see* Partnership Law § 24, § 26; *see e.g. Fanelli v Adler*, 131 AD2d 631 [1987]). However, the complaint was appropriately dismissed as against Dr. Waldman, since the evidence showed that at the time of the infant plaintiff's delivery he was merely an employee of the obstetrical practice, and that plaintiff mother was under the care of Dr. Oberlander, who made the relevant decisions as to the plan for delivery.

Accordingly, the judgment of the Supreme Court, Bronx County (Barry Salman, J.), entered October 1, 2010, dismissing the action against all defendants except Eugene Sidoti, Sr., M.D., and bringing up for review an order, same court and Justice, entered August 25, 2010, to the extent it granted said

defendants' motions for summary judgment dismissing the complaint, should be modified, on the law, vacated as to defendants Katkin, Oberlander and Lombardi and defendant hospital, and the complaint reinstated as against defendants Katkin, Oberlander and Lombardi and defendant hospital, and otherwise affirmed, without costs. Plaintiffs' appeal from the August 25, 2010 order should be dismissed, without costs, as subsumed in the appeal from the judgment. The foregoing order, insofar as it denied defendant Sidoti's motion for summary judgment, should be affirmed, without costs.

All concur.

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

ENTERED: APRIL 19, 2012

CLERK