

EVIDENCE

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CONTENTS

INTRODUCTION	744
I. COURT OF APPEALS	745
A. <i>Televised Trial Testimony by Complainant</i>	745
B. <i>Eyewitness Expert Testimony</i>	749
C. <i>Inferences</i>	752
D. <i>Proof of Insurance</i>	754
E. <i>Uncharged Crime</i>	755
II. PROCEDURAL MATTERS	758
A. <i>Foundation</i>	758
1. <i>No Foundation for Admission of Videotape of Defendant Performing Charged Sex Acts</i>	758
2. <i>Foundation Established for Admission of Copy of Audio Recordings</i>	760
B. <i>Exclusion</i>	761
C. <i>Res Ipsa Loquitur</i>	763
D. <i>Cross-Examination</i>	763
E. <i>Destruction of Electronically Stored Information</i>	765
F. <i>Role of Counsel Representing Non-Party at Deposition to Preserve Trial Testimony</i>	768
III. PRESUMPTIONS	771
A. <i>Motor Vehicle Permissive Use</i>	771
B. <i>Regularity</i>	772
C. <i>Mailing</i>	773
D. <i>Presumption of Good Faith</i>	773

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744	Syracuse Law Review	[Vol. 61:743
	<i>E. Parol Evidence</i>	773
IV.	HEARSAY	774
	<i>A. Unavailability of Witness</i>	774
	<i>B. Declaration Against Penal Interest</i>	775
	<i>C. Present Sense Impression</i>	776
	<i>D. Business Record Exception</i>	777
	<i>E. Res Gestae</i>	780
	<i>F. Business Records</i>	780
	<i>G. 911 Calls</i>	781
	<i>H. Germane to Treatment</i>	782
	<i>J. Admissions</i>	782
V.	EXPERT WITNESSES	783
	<i>A. Timing of Expert Exchanges</i>	783
	1. <i>Experts at Trial</i>	783
	2. <i>Experts on Summary Judgment</i>	785
	3. <i>Contrasting Expert Exchange for Trial Versus</i> <i>Summary Judgment</i>	787
	<i>B. Expert Required in Legal Malpractice Action</i>	788
	<i>C. Expert Testimony Concerning Average Reaction Time</i>	789
	CONCLUSION	799

INTRODUCTION¹

For 2011, the editors have returned the *Survey* to its core function: providing a compendium of the statutory changes and case law developments for a one-year period, in this issue, July 1, 2009 through

1. This year's *Survey* was made possible by the support and encouragement of, first and foremost, the editorial staff of the *Syracuse Law Review*, particularly Kate I. Reid, Lead Articles Editor of the *Syracuse Law Review* and member of the Class of 2011. It also would not have made its way in to print without the final ultimatum delivered by the *Law Review's* Editor-in-Chief, Jennifer Haralambides. I offer them and their colleagues my sincere thanks and best wishes for what will be outstanding careers at the bar.

I was very fortunate to have received continued research assistance from Eric Wahrburg, St. John's Law School, Class of 2011, who has made a significant contribution to this *Survey*. He was joined this year by his classmate, Vladimir Amporov, by members of the Class of 2012, Brian King, Harpreet Multani, and Jessica Stukonis, together with members of the class of 2013, Assen Harizanov, Joseph Lobosco, and Nicholas Mondello, whose contributions are reflected in this year's *Survey*, and will be incorporated in next year's as well (if I am invited back).

I am fortunate to continue to receive inspiration, encouragement, and repeated doses of good cheer from my good friend and mentor, Professor Richard T. Farrell, the Wilbur A. Levin Distinguished Service Professor of Law at Brooklyn Law School. To most on the bench and at the bar in New York his name is synonymous with evidence, and rightly so. This *Survey* also benefited from a thoughtful review by Professor Martin A. Schwartz, Touro Law Center, who posed a number of insightful questions.

Needless to say, I am solely responsible for any errors contained herein.

June 30, 2010. In years past, other authors and I have exceeded the formal end date of June 30 as we labored to cram ever more recent decisions into each *Survey*. While arguably increasing the utility of the *Survey*, the practice exponentially increased the editorial work to be performed by the members of the *Syracuse Law Review*, and eliminated uniformity in the coverage by the different articles.

The *Evidence Survey* last year contained some cases decided after July 1, 2009, and to accomplish the goal of this year's *Survey*, they are included herein, as well. Thus, some old wine is in this new bottle.

Repetition is a tool used by every trial attorney. Advocates tell a jury what they are about to tell them, tell them, and then tell them what they just told them. For this *Survey*, repetition will cause no harm, and perhaps a case that did not resonate last year will be of significance to readers this year.

The editors also decided this year, in an effort to streamline the *Survey*, not to include a separate *Disclosure Survey*,² preferring instead to have disclosure cases covered in, and divided between, the *Civil Practice Survey*, authored by Michael A. Bottar and Kimberly Wolf-Price,³ and this *Evidence Survey*.

Readers of this *Survey* are invited to visit www.newyorkpractice.org from time to time for updates on the cases reported herein, and e-mail any comments, suggestions, or criticisms to david@newyorkpractice.org.

So, on to some evidence (and a few disclosure) cases.

I. COURT OF APPEALS

A. *Televised Trial Testimony by Complainant*

In *People v. Wrotten*, the Court framed the issue:

On this appeal, we are asked to determine whether Supreme Court erred in permitting an adult complainant living in another state to testify via real-time, two-way video after finding that because of age and poor health he was unable to travel to New York to attend court. We conclude that Supreme Court did not err, as the court's inherent powers and Judiciary Law section 2-b vest it with the authority to fashion a procedure such as the one employed here. Furthermore, we conclude that defendant's confrontation rights have not been

2. Apparently, middle-aged spread is not something limited to middle-aged *Survey* authors.

3. See Michael A. Bottar & Kimberly Wolf Price, *Civil Practice, 2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 631 (2011).

unconstitutionally impaired.⁴

Prior to trial, the People were granted a Criminal Procedure Law (CPL) section 660.20 conditional examination of the complainant.⁵ Due to the complainant's illness, the examination could not be conducted in New York, as required by the statute.⁶ The trial court permitted the examination to be conducted "via two-way video conferencing, with the witness remaining in California and the commissioners conducting the examination in New York," conditioning the relief with the requirement "that complainant's video appearance be live at trial and that the People first demonstrate that the witness would otherwise be unavailable to testify in New York."⁷ The trial court's conviction was reversed and vacated by the Appellate Division, First Department, which held the admission of televised testimony was barred in the absence of express legislative authorization.⁸

The Court of Appeals noted that "[a]lthough the Legislature has primary authority to regulate court procedure, 'the Constitution permits the courts latitude to adopt procedures consistent with general practice as provided by statute.'"⁹ The Court further reasoned that "[b]y enacting Judiciary Law section 2-b(3), the Legislature has explicitly authorized the courts' use of innovative procedures where 'necessary to carry into effect the powers and jurisdiction possessed by [the court].'"¹⁰ Thus, the Court recognized that New York "courts may fashion necessary procedures consistent with constitutional, statutory, and decisional law."¹¹ The Court noted defendant's inability to point to any statutory bar, concluding that "the CPL requires live video testimony of a child witness in a prosecution of a sex crime after a judicial finding of 'vulnerability.' [But] is silent as to other types of witnesses."¹² At the same time, "statutes providing for preservation of pre-trial testimony implicitly preclude the admission of live video testimony."¹³

4. 14 N.Y.3d 33, 36, 923 N.E.2d 1099, 1100, 896 N.Y.S.2d 711, 712 (2009), *cert. denied*, 130 S. Ct. 2520, 2520 (2010).

5. *Id.*, 923 N.E.2d at 1100-01, 896 N.Y.S.2d at 712.

6. *Id.* at 36-38, 923 N.E.2d at 1101-02, 896 N.Y.S.2d at 713.

7. *Id.* at 36-37, 923 N.E.2d at 1101, 896 N.Y.S.2d at 713.

8. *Id.* at 37, 923 N.E.2d at 1101, 896 N.Y.S.2d at 713. The First Department decision can be found at 60 A.D.3d 165, 871 N.Y.S.2d 28 (1st Dep't 2008).

9. *Wrotten*, 14 N.Y.3d at 37, 923 N.E.2d at 1101, 896 N.Y.S.2d at 713 (quoting *People v. Ricardo B.*, 73 N.Y.2d 228, 232, 535 N.E.2d 1336, 1338, 538 N.Y.S.2d 796, 798 (1989)).

10. *Id.*

11. *Id.*

12. *Id.* at 38, 923 N.E.2d at 1101-02, 896 N.Y.S.2d at 713.

13. *Id.*, 923 N.E.2d at 1102, 896 N.Y.S.2d at 714.

The Court next examined the videotaped testimony under the Confrontation Clause of both the federal and New York State constitutions.¹⁴

CPL article 65's authorization of two-way closed-circuit testimony in a criminal trial passes constitutional muster . . . [and] the United States Supreme Court held that live testimony via one-way closed-circuit television is permissible under the Federal Constitution, provided there is an individualized determination that denial of "physical, face-to-face confrontation" is "necessary to further an important public policy" and "the reliability of the testimony is otherwise assured."¹⁵

Acknowledging that New York's two-way televised procedure may not always satisfy the Confrontation Clause, the Court determined that "complainant's testimony would nonetheless be admissible under the federal standard if findings of necessity and reliability were made by the trial court."¹⁶ Traditional elements of confrontation were preserved, "including testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity for the judge, jury, and defendant to view the witness's demeanor as he or she testifies," and the Court found those elements were present in *Wrotten*.¹⁷ The Court noted that the:

[P]ublic policy of justly resolving criminal cases while at the same time protecting the well-being of a witness can require live two-way video testimony in the rare case where a key witness cannot physically travel to court in New York and where, as here, defendant's confrontation rights have been minimally impaired.¹⁸

The Court then concluded:

Live televised testimony is certainly not the equivalent of in-person testimony, and the decision to excuse a witness's presence in the courtroom should be weighed carefully. Televised testimony requires a case-specific finding of necessity; it is an exceptional procedure to be used only in exceptional circumstances. We do not decide here whether Supreme Court's finding of necessity rested on clear and convincing evidence, as the Appellate Division did not address that question. We only pass on whether Supreme Court had authority to utilize a procedure "necessary to carry into effect the powers and

14. *Wrotten*, 14 N.Y.3d at 38, 923 N.E.2d at 1102, 896 N.Y.S.2d at 714.

15. *Id.* at 38-39, 923 N.E.2d at 1102, 896 N.Y.S.2d at 714 (citing *People v. Cintron*, 75 N.Y.2d 249, 253, 551 N.E.2d 561, 564, 552 N.Y.S.2d 68, 71 (1990)) (quoting *Maryland v. Craig*, 497 U.S. 836, 850 (1990)).

16. *Id.* at 39, 923 N.E.2d at 1102, 896 N.Y.S.2d at 714.

17. *Id.* at 39, 923 N.E.2d at 1102-03, 896 N.Y.S.2d at 714 (citation omitted).

18. *Id.* at 40, 923 N.E.2d at 1103, 896 N.Y.S.2d at 715.

jurisdiction possessed by it.” As the dissent below correctly noted, “[i]n the absence of direction from the Legislature, Supreme Court retained discretion . . . to determine what steps, if any, could be taken to permit this prosecution to proceed notwithstanding the complaining witness’s inability to be physically present in the courtroom.”¹⁹

The Court reversed the order of the appellate division and remitted to that court for further proceedings.²⁰ Thereafter, the United States Supreme Court denied certiorari,²¹ and Justice Sotomayor issued a statement regarding the procedural posture of the case vis-a-vis the denial of certiorari, emphasizing that the denial not be construed as a ruling on the merits:

This case presents the question whether petitioner’s rights under the Confrontation Clause of the Sixth Amendment, as applied to the States through the Fourteenth Amendment, were violated when the State introduced testimony at his trial via a two-way video that enabled the testifying witness to see and respond to those in the courtroom, and vice versa. The question is an important one, and it is not obviously answered by *Maryland v. Craig*. We recognized in that case that “a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial,” but “only where denial of such confrontation is necessary to further an important public policy.” In so holding, we emphasized that “[t]he requisite finding of necessity must of course be a case-specific one.” Because the use of video testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling.

The instant petition, however, reaches us in an interlocutory posture. The New York Court of Appeals remanded to the Appellate Division for further review, including of factual questions relevant to the issue of necessity. Granting the petition for certiorari at this time would require us to resolve the threshold question whether the Court of Appeals’ decision constitutes a “[f]inal judgment[t]” under 28 U.S.C. § 1257(a). Moreover, even if we found the judgment final, in reviewing the case at this stage we would not have the benefit of the state courts’ full consideration.

In light of the procedural difficulties that arise from the interlocutory posture, I agree with the Court’s decision to deny the petition for certiorari. But following the example of some of my colleagues, “I think it appropriate to emphasize that the Court’s action does not constitute a ruling on the merits and certainly does not represent an

19. *Wrotten*, 14 N.Y.3d at 40, 923 N.E.2d at 1103, 896 N.Y.S.2d at 715 (citations omitted).

20. *Id.*

21. *Wrotten v. New York*, 130 S. Ct. 2520 (2010).

expression of any opinion concerning” the importance of the question presented.²²

On remand to the trial court, the defendant was convicted, and the conviction was affirmed by the First Department:

At the conclusion of the evidentiary hearing, Supreme Court expressly found “by clear and convincing evidence that [the complainant] is unavailable to travel to New York without seriously endangering his health.” Supreme Court went on to find that the complainant “would be in serious danger of suffering serious health problems or possibly death by his traveling and testifying.” On our review of the facts, we conclude that Supreme Court did not err in making these findings. We recognize that the medical risk the complainant would incur by traveling can be “serious” without being more likely than not to come to fruition. As defendant never contended that a “serious” risk was insufficient to warrant a finding that the complainant was unable to travel, we need not and do not decide whether any greater degree of risk is required. Indisputably, moreover, the complainant was a key witness. For these reasons, the use of live, two-way video was necessary to further the “public policy of justly resolving criminal cases while at the same time protecting the well-being of a witness.”²³

Both the Court of Appeals²⁴ and United States Supreme Court²⁵ declined to hear defendant’s appeal.

B. Eyewitness Expert Testimony

The Court reviewed two cases in which trial courts precluded the use of expert testimony on the reliability of eyewitness identification, concluding that one justice abused his discretion, while the second did not.²⁶

In the first case, *People v. Abney*, defendant moved in limine prior to jury selection to be permitted “to present expert testimony concerning ‘psychological factors of memory and perception that may affect the accuracy of witness identifications.’”²⁷ Defendant’s expert identified fifteen factors that were claimed to be beyond the ken of the average

22. *Id.* at 2520-21 (citations omitted).

23. *People v. Wrotten*, 73 A.D.3d 637, 637-38, 901 N.Y.S.2d 265, 265-66 (1st Dep’t 2010) (citation omitted).

24. *People v. Wrotten*, 15 N.Y.3d 811, 934 N.E.2d 905, 908 N.Y.S.2d 171 (2010).

25. *Wrotten v. New York*, 131 S. Ct. 1020 (2011).

26. *People v. Abney*, 13 N.Y.3d 251, 256, 918 N.E.2d 486, 487, 889 N.Y.S.2d 890, 891 (2009) (consolidating *People v. Abney* and *People v. Allen*).

27. *Id.* at 259, 918 N.E.2d at 489, 889 N.Y.S.2d at 893.

juror,²⁸ and “specifically noted that the robbery was brief, the victim was under stress, and a weapon was used.”²⁹

The trial court “denied the motion as premature, with leave to renew at the close of the People’s direct case,” setting forth a number of reasons and concluding with the comment that “jurors know that, as a matter of common sense, a person’s memory does fade as time passes.”³⁰ In the court’s view:

“Many” of defendant’s concerns relative to the accuracy of Farhana’s eyewitness identification could be adequately addressed by tailoring cross-examination and the jury charge. He indicated that defendant was “free to renew his motion at the close of the People’s case, at which time he [should] narrow his proffer to the specific topics that he believes are relevant to the facts of this case.”³¹

Defendant renewed the application at the close of People’s direct case, and

The trial judge denied defendant’s renewed motion on the ground that “having had the benefit of the witness’ testimony,” there was “nothing unique about [the] case . . . present[ing] issues that are beyond the ken of the ordinary juror.” In his view, the relevant issues had been explored adequately during cross-examination, and could be argued in summation and covered in the jury charge.³²

The defendant was convicted, and the appellate division, with two justices dissenting, affirmed.³³ Both the majority and dissenting justices focused on the issue of corroboration, with the majority reciting the “significant evidence corroborating defendant’s guilt, such that ‘by the terms of the *LeGrand* rule itself, the exclusion of the proffered expert testimony was within Supreme Court’s discretion,” and the dissenting justices focusing on what they characterized as “‘not a scintilla’ of evidence corroborating the eyewitness’s identification.”³⁴

28. *Id.* Namely:

[S]tress, exposure time, color perception under monochromatic light, event violence, cross-racial accuracy, similarity of lineup fillers, lineup instructions, rate of memory loss, postevent information, the wording of questions posed to an eyewitness, unconscious transference to the crime scene of someone seen in another situation or context, the witness’s preexisting attitudes and expectations, simultaneous and sequential lineups, the lack of correlation of confidence and accuracy, and confidence malleability.

Id.

29. *Id.*

30. *Abney*, 13 N.Y.3d at 259-60, 918 N.E.2d at 489-90, 889 N.Y.S.2d at 893-94.

31. *Id.* at 260, 918 N.E.2d at 490, 889 N.Y.S.2d at 894.

32. *Id.* at 260-61, 918 N.E.2d at 490, 889 N.Y.S.2d at 894.

33. *Id.* at 261, 918 N.E.2d at 490, 889 N.Y.S.2d at 894.

34. *Id.*, 918 N.E.2d at 491, 889 N.Y.S.2d at 895 (citations omitted).

In *People v. Allen*, the second consolidated case in the *Abney* decision, defendant moved in limine to offer expert testimony “regarding seventeen ‘psychological factors of memory and perception that may affect the accuracy of eyewitness identifications.’”³⁵ In support of the motion, the expert averred concerning the factors “he proposed to testify [about], but not how [those] factors were relevant to the case.”³⁶ In subsequent proof, the expert discussed the stressors created by the use of a weapon in the commission of the crime, and expanded on the idea of “‘unconscious transference’ [which] was relevant because the eyewitnesses claimed that they had seen defendant in the neighborhood before, and thus it was possible that they identified defendant because ‘he’s the only one in the lineup that they’ve seen in the neighborhood.’”³⁷

The trial court denied the motion, holding that the “defendant should address the reliability of eyewitness identification during cross-examination and in summation,” as well as the renewed application, “again deciding that the issue was a matter of common sense.”³⁸ The appellate division affirmed.³⁹

In *Abney*, the Court reversed, finding an abuse of discretion in denying the renewed motion made at the close of the People’s direct case.⁴⁰ At that point in the trial only the victim’s testimony connected the defendant to the crime charged, and the topics for which expert evidence was proffered included, “the effect of event stress, exposure time, event violence and weapon focus, cross-racial identification, lineup instructions, double-blind lineups, and witness confidence. All but two of [which]—lineup instructions and double-blind lineups—[were] relevant to [the victim’s] identification of defendant.”⁴¹ The proper procedure was for the trial court to have conducted a *Frye* hearing⁴² on topics that were not generally accepted, although the Court held that the general principles involved in the testimony were generally accepted.⁴³ Because they were counterintuitive, they were “beyond the

35. *Abney*, 13 N.Y.3d at 264, 918 N.E.2d at 492, 889 N.Y.S.2d at 896.

36. *Id.*, 918 N.E.2d at 493, 889 N.Y.S.2d at 897.

37. *Id.* at 264-65, 918 N.E.2d at 493, 889 N.Y.S.2d at 897.

38. *Id.* at 265, 918 N.E.2d at 493, 889 N.Y.S.2d at 897.

39. *Id.*

40. *Abney*, 13 N.Y.3d at 268-69, 918 N.E.2d at 496, 889 N.Y.S.2d at 900.

41. *Id.* at 268, 918 N.E.2d at 495-96, 889 N.Y.S.2d at 899-900.

42. An explanation of both the *Frye* standard in New York State courts and an overview of the evidence considered in a *Frye* Hearing is set forth in *People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

43. *Abney*, 13 N.Y.3d at 267, 918 N.E.2d at 495, 889 N.Y.S.2d at 899.

ken of the average juror.”⁴⁴

The fact that the defendant pursued an alibi defense after the renewal motion was denied was of no moment: “While defendant’s muddled alibi evidence was no doubt unhelpful to his cause with the jury, it is not overwhelmingly inculpatory either. And, of course, it is possible that the defendant would not have pursued an alibi defense in the first place if [the expert] had testified.”⁴⁵

In *Allen*, the Court affirmed.⁴⁶ The People’s case did not rise and fall on the victim’s identification, as another victim independently identified the defendant, who was not a stranger to either victim.⁴⁷

C. Inferences

Last year’s *Survey* reported the Court’s decision in *People v. Bailey*,⁴⁸ where the Court held that a defendant’s inculpatory statement was insufficient to support the verdict of possession of a forged instrument count where the defendant, following his arrest by an anti-pick pocketing squad, was found in possession of counterfeit currency, holding the statement did not support the element of intent.⁴⁹

This year, the First Department, in *People v. Rodriguez*, held that a jury could reasonably infer that defendant possessed the requisite intent to defraud, based circumstantial evidence, where defendant, at the time of his arrest, was in possession of forged documents.⁵⁰ After reviewing the elements of criminal possession of a forged instrument in the second degree, the court focused on the issue of intent:

In the case before us, only the element of intent is at issue. Intent “is the product of the invisible operation of [the] mind.” As such, direct proof is rarely available and the requisite proof may be circumstantial. While a defendant’s intent must be specific to the crime, the specific intent required for possession of a forged instrument is a state of mind that may “be inferred from the act itself . . . [or] from the defendant’s conduct and the surrounding circumstances.” Further, the intent to defraud or deceive need not be targeted at any specific person; a general intent to defraud suffices and the statute does not require that the defendant actually attempt to use the forged documents.

44. *Id.* at 268, 918 N.E.2d at 496, 889 N.Y.S.2d at 900.

45. *Id.*

46. *Id.* at 269, 918 N.E.2d at 496, 889 N.Y.S.2d at 900.

47. *Id.*

48. See David Paul Horowitz, *Evidence, 2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 947, 955-57 (2010).

49. 13 N.Y.3d 67, 72-73, 915 N.E.2d 611, 614-15, 886 N.Y.S.2d 666, 669-70 (2009).

50. 71 A.D.3d 450, 451-53, 897 N.Y.S.2d 42, 43-45 (1st Dep’t 2010).

Applying these principles, legally sufficient evidence was presented at trial from which the jury could rationally infer that defendant possessed the forged identification cards with the intent to defraud, deceive or injure another.

First, the identity cards recovered were undisputedly fakes and served no purpose other than to establish the identity of the holder. Because the need for such proof arises only when the bearer seeks to obtain some privilege, right, benefit or entitlement, the jurors could rationally conclude that there was no reason for defendant to knowingly possess *four* false identity documents unless he intended to present them as real, i.e., to defraud or deceive another.

Second, it is highly significant on the issue of intent that three of the four concededly fake identification cards bore photographs of defendant wearing what appeared to be the same corduroy jacket that he was wearing on the day he was arrested, as did the four additional loose photographs, sized to fit identification cards, recovered from defendant's pocket. From this, the jury could rationally conclude that defendant had been actively involved in the fabrication of the fake identification cards, which he intended to use for some deceptive purpose.

Lastly, the jury could rationally conclude that defendant had a motive to create a false identity for the specific purpose of evading law enforcement authorities in connection with the Devine Perez investigation. This may be inferred from the detective's testimony that he telephoned the suspect known to him as Perez and advised him that he wanted to speak to him, and that he apprehended the suspect he was looking for and determined that his actual name was Isidro Rodriguez, the defendant. That defendant knew that the police were looking for him is further supported by the detective's testimony that when he spotted the suspect, the pair made eye contact, and the suspect repeatedly looked back at the detective as he walked away.⁵¹

The *Rodriguez* court distinguished the case before it from *Bailey*, holding that the Court of Appeals decision:

[D]oes not mandate a different conclusion. Although the detective in this case did not see defendant present any of the identification cards to any person or public authority and had no information that defendant had ever done so, *Bailey* does not make the actual use of the forged instrument a prerequisite to a finding of deceitful intent.⁵²

51. *Id.* at 452-53, 897 N.Y.S.2d at 44-45 (citations omitted).

52. *Id.* at 454, 897 N.Y.S.2d at 46.

D. Proof of Insurance

In a dental malpractice action, “defendant moved in limine to preclude plaintiff from cross-examining defendant’s expert regarding the fact that he and defendant were both shareholders of and insured by the same dental malpractice insurance company, OMS National Insurance Company (OMSNIC).”⁵³ While plaintiff opposed the motion, plaintiff’s counsel did not voir dire the witness on the issue, and “supreme court granted the motion, finding that the probative value of the inquiry would be outweighed by the prejudicial effect of having defendant’s insurance coverage revealed to the jury.”⁵⁴ A defense verdict ensued, affirmed on appeal.⁵⁵

The Court began with a review of the standard on appeal: “[a]lthough cross-examination is a matter of right, it is well settled that its scope and manner are left to the sound discretion of the trial court. Therefore, absent an abuse of discretion, a trial court’s determination is beyond our review.”⁵⁶

The Court next reviewed the rule and rationale that “[e]vidence that a defendant carries liability insurance is generally inadmissible,” noting:

The rule, however, is not absolute. If the evidence is relevant to a material issue in the trial, it may be admissible notwithstanding the resulting prejudice of divulging the existence of insurance to the jury. For example, we have held that evidence that a defendant insured a premises is relevant to demonstrate ownership or control over it. Likewise, it was proper to allow cross-examination of a physician regarding the fact that the defendant’s insurance company retained him to examine the plaintiff in order to show bias or interest on the part of the witness.⁵⁷

The Court found no abuse of discretion:

Such evidence may be excluded if the trial court finds that the risk of confusion or prejudice outweighs the advantage in receiving it. In this case, plaintiff speculated during the colloquy that a verdict in defendant’s favor could result in a \$100 benefit—at the time of the expert’s death, disability or retirement—based on the expert’s shareholder status in OMSNIC. The trial court’s finding that any such financial interest was likely “illusory” and that the possibility of bias

53. *Salm v. Moses*, 13 N.Y.3d 816, 817, 918 N.E.2d 897, 897-98, 890 N.Y.S.2d 385, 385-86 (2009).

54. *Id.*, 918 N.E.2d at 898, 890 N.Y.S.2d at 386.

55. *Id.*

56. *Id.* (citations omitted).

57. *Id.* at 817-18, 918 N.E.2d at 898, 890 N.Y.S.2d at 386 (citations omitted).

was attenuated was reasonable on this record. Absent a more substantial connection to the insurance company—or at least something greater than a de minimis monetary interest in the carrier’s exposure—the court did not engage in an abuse of discretion in precluding the testimony. We note that a voir dire of an expert outside the presence of the jury can better aid the court in exploring the potential for bias.⁵⁸

E. Uncharged Crime

In *People v. Arafet*, the defendant was prosecuted for stealing a trailer filled with merchandise.⁵⁹ The prosecution used evidence of uncharged crimes consisting of cell phone calls made to a trailer yard that had been used in prior thefts for fencing stolen merchandise.⁶⁰ For each of the four incidents of uncharged crimes, the defendant objected, claiming that they violated a *Molineux* exception.⁶¹ The Court, in a 4-3 decision, held that three of the four incidents were properly admitted:

Applying these principles to this case, we conclude that the evidence relating to Gotay’s fencing operation and to the crime committed in 1996 by defendant and Quintanilla was admissible. Evidence of the crime committed by defendant in April 2000 was not.

As to the evidence of Gotay’s fencing operation, the issue is easy: This was not *Molineux* evidence at all. The point of *Molineux* is to prevent a jury from convicting a defendant because of his criminal propensity. Evidence of two criminal transactions in which defendant was not involved could show nothing about his propensity. The evidence was relevant to the case: It showed that a business defendant called in the hours immediately after the theft was one where stolen goods could be disposed of, and it thus supported an inference that defendant at that moment needed a fence’s services.

The evidence of the 1996 crime, however, does present a *Molineux* issue, for that crime involved defendant as well as Quintanilla, and could have led a jury to infer that defendant had a propensity for crime. Still, it was not an abuse of discretion to admit the evidence. The predicate for its admission was evidence showing that defendant called Quintanilla shortly after the theft; that Quintanilla traveled from Florida to New Jersey beginning the next day; and that Quintanilla

58. *Salm*, 13 N.Y.3d at 818, 918 N.E.2d at 898-99, 890 N.Y.S.2d at 386-87 (citation omitted).

59. 13 N.Y.3d 460, 463, 920 N.E.2d 919, 920, 892 N.Y.S.2d 812, 813 (2009).

60. *Id.* at 463-64, 920 N.E.2d at 920-21, 892 N.Y.S.2d at 813-14.

61. *Id.* at 464, 920 N.E.2d at 921, 892 N.Y.S.2d at 814. See *People v. Molineaux*, 168 N.Y. 264, 61 N.E. 286 (1901).

arrived in northern New Jersey not long before the discovery of the stolen trailer, with a tractor attached, on a highway in the vicinity. Abandonment of the tractor-trailer (unless the thief walked away from it) was a task that required an accomplice with a second vehicle. The evidence supported an inference that Quintanilla provided defendant with the ride he needed.

We have held that evidence of “a distinctive repetitive pattern” of criminal conduct may be admitted under *Molineux* to show the defendant’s identity. Repeated commission of similar crimes with the same accomplice is an example of such a pattern. Because the evidence supported a finding that Quintanilla and defendant were working together to commit the crime in this case, *Molineux* did not require that the jury be kept ignorant of the fact that they had worked together on such a transaction before.

There was, however, no valid ground for admitting proof of the April 2000 incident. The People acknowledge, in substance, that the only relevance of that proof was to show that defendant was an experienced trailer thief. This is not, the People argue, pure propensity evidence because of the nature of the crime—a specialized one, that required unusual skills, knowledge and access to the means of committing it. But we see no justification, at least in a case like this, for creating a “specialized crime” exception to *Molineux*. No doubt this crime is beyond the skills of the average citizen; most people could not swiftly hook a trailer to a tractor and drive it away. But the crime could probably have been committed by any experienced tractor-trailer driver, and we cannot believe there was no less prejudicial way to prove that defendant had experience in that line of work. This was not a crime “so unique that the mere proof that the defendant had committed a similar act would be highly probative of the fact that he committed the one charged.” Admitting the evidence of the April 2000 incident violated the *Molineux* rule.⁶²

The Court concluded that the admission of the fourth uncharged crime was harmless error given the totality of the properly admitted evidence:

All these facts were proved by near-irrefutable evidence and, taken together, they exclude to a virtual certainty any hypothesis of defendant’s innocence. The idea that he happened to be pulling a trailer other than the stolen one, at the same time and over the same route that the stolen trailer would logically have traveled, while the stolen trailer was for some reason elsewhere, borders on the fanciful. The idea that, at the time of this astonishing coincidence, defendant

62. *Arafet*, 13 N.Y.3d at 465-66, 920 N.E.2d at 922-23, 892 N.Y.S.2d at 815-16 (citations omitted).

just happened to place phone calls to Gotay's fencing operation (three times) and to his old accomplice Quintanilla is absurd.

Nor do we see any likelihood that the jury would have acquitted defendant if it had not heard the improperly admitted evidence. The jury properly had before it all the evidence we have just recited. Thus it would have known, without evidence of defendant's April 2000 crime, not only all the facts pointing to his commission of the 2003 theft, but also that he stole a trailer (with Quintanilla) in 1996. As to both the 1996 and the April 2000 incidents, the jury was instructed that they were "no proof whatsoever that he possessed a propensity or disposition to commit the crimes charged in this indictment or any other crime. It is not offered for such a purpose and must not be considered by you for that purpose." Of course, there can be no absolute certainty that the jury followed this instruction—but if it did not, the prejudicial effect of the evidence that was admitted in error could not have added much to the effect of the evidence properly admitted. There is no significant probability that the result in this case would have been different if the trial court had, as it should, excluded the evidence of defendant's April 2000 theft.⁶³

The dissenters found more than just the single *Molineux* error, and explained why the errors were not harmless:

Here, the majority contends that the noncollateral evidence against defendant was so compelling and overwhelming that it "exclude[s] to a virtual certainty any hypothesis of defendant's innocence." The noncollateral evidence, however, was neither overwhelming nor particularly compelling. The prosecution's fingerprint evidence taken from a New York State Thruway toll ticket consisted of a partial, smudged left index fingerprint (allegedly from defendant) sharing a loop that is common to 70% of the population. The prosecution urged that this toll ticket handed to a toll booth collector on the route that the driver may have taken was from the only five-axle truck driving that portion of the highway at around the time of the crime. The second piece of evidence was cell-site information showing that calls were made from one of defendant's cell phones that ostensibly track the same route. There was no testimony from eyewitnesses, DNA evidence, inculpatory statements by defendant, or any contraband (cash or merchandise) recovered from defendant or anyone else. This evidence was certainly not overwhelming in establishing defendant's guilt.

The prejudice to defendant, however, in allowing an FBI agent to testify as to his prior federal felony conviction, along with the

63. *Id.* at 466-68, 920 N.E.2d at 923-24, 892 N.Y.S.2d at 816-17.

underlying facts of that crime, and the admission of another federal agent's testimony regarding the facts from a previous tractor-trailer offense, is significant. Allowing the evidence that defendant contacted a federally convicted "fence" compounded the prejudicial effect of these errors. Finally, the fact that at least one fifth of this trial was dedicated to collateral matters casts serious doubts on whether defendant received a fair trial.

Nor were the errors in admitting extensive testimony of extraneous criminal acts cured by the limiting instructions. County court's jury instruction first contains a summary of the collateral evidence against defendant, merely highlighting this wrongful evidence to the jury, and then the court told the jury that it must not view these crimes for propensity but for a common scheme or plan and as identity evidence. While the instruction may have served to highlight the wrongly admitted evidence, it certainly failed to cure the prejudice to defendant.

In conclusion, the admission of evidence regarding defendant's prior bad acts and the bad acts of third parties was highly prejudicial and served to deprive defendant of a fair trial. Where the evidence is far from overwhelming, it cannot be said that the result would have been the same if it were possible to extricate such egregious errors.⁶⁴

II. PROCEDURAL MATTERS

A. *Foundation*

1. *No Foundation for Admission of Videotape of Defendant Performing Charged Sex Acts*

The admissibility of a videotape discovered by defendant's housemate, showing defendant performing oral sex on the sleeping victim, was at issue in *People v. Roberts*.⁶⁵

The Third Department outlined three methods for authenticating the videotape.⁶⁶ First, authentication could be provided "by the testimony of a participant or a witness to the recorded events, such as the videographer, that the videotape is a complete and accurate representation of the subject matter depicted."⁶⁷ Second, "[w]here no witness or participant is available to testify, a videotape may be authenticated by the testimony of an expert that it 'truly and accurately

64. *Id.* at 472-74, 920 N.E.2d at 928-29, 892 N.Y.S.2d at 821-22 (citation omitted).

65. 66 A.D.3d 1135, 1135-37, 887 N.Y.S.2d 326, 327-29 (3d Dep't 2009).

66. *Id.* at 1135-36, 887 N.Y.S.2d at 327-28.

67. *Id.*, 887 N.Y.S.2d at 327 (citations omitted).

2011]

Evidence

759

represents what was before the camera' and has not been altered."⁶⁸

Third,

"[e]vidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering." This chain of custody method of authentication requires, "in addition to evidence concerning the making of the [video]tape [] and identification of the [participants], that within reasonable limits those who have handled the [video]tape from its making to its production in court 'identify it and testify to its custody and unchanged condition.'"⁶⁹

With no testimony, expert or otherwise, establishing the authenticity of the videotape, the People relied upon the chain of custody, "proffering the testimony of defendant's housemate who discovered the videotape in defendant's bedroom and a police officer who received the videotape from the housemate," and county court admitted the videotape over objection.⁷⁰

The Third Department reversed:

In our view, the authenticity and accuracy of the videotape was not established by the chain of custody testimony. At the time the videotape was admitted into evidence, there was no testimony concerning the making of the videotape, where it was kept or who had access to it during the nearly three-year period from the time of its making to its discovery by defendant's housemate in 2006. Indeed, "[b]ecause films are so easily altered, there is a very real danger that deceptive tapes, inadequately authenticated, could contaminate the trial process." Had the People provided some other foundational proof—such as expert testimony that the videotape fairly and accurately depicted what was before the camera and that an analysis of it revealed no indication of alterations—"the gap in the chain of custody would affect the weight but not the admissibility of the tape []." Here, however, no such proof was offered. Therefore, because the evidence presented was insufficient to provide the required foundation for admission of the videotape, it was an abuse of discretion for county court to admit it into evidence.⁷¹

It did not matter that defendant, after the admission of the videotape, testified that the sexual acts depicted were consensual: "[t]hose admissions, presented long after the admission of the

68. *Id.* at 1136, 887 N.Y.S.2d at 327-28 (citations omitted).

69. *Id.*, 887 N.Y.S.2d at 328 (alteration in original) (citations omitted).

70. *Roberts*, 66 A.D.3d at 1136, 887 N.Y.S.2d at 328.

71. *Id.* at 1136-38, 887 N.Y.S.2d 326, 328-29 (citations omitted).

videotape, ‘do not satisfy the requirement that the fairness and accuracy of the entire [videotape] be established as a *predicate* of admissibility.’”⁷² Finally, the appellate court concluded that admission of the videotape was not harmless error.⁷³ “Insofar as the victim testified that he had no recollection of the events depicted on the videotape, its evidentiary value was significant. Under these circumstances, we cannot conclude that there was ‘no reasonable possibility that the erroneously admitted evidence contributed to the conviction.’”⁷⁴

People v. Roberts was cited later in the *Survey* year by the Third Department in *People v. Burdick*, where reports were erroneously admitted into evidence in a case “grounded solely upon circumstantial evidence”:

[The reports] had significant evidentiary value, in that they provided the only evidence establishing that winning lottery tickets were being redeemed from lottery books that had been activated, but from which no sales had been recorded. These reports also provided the sole evidence of the time and date when the winning tickets were redeemed which, when considered in connection with other records establishing when the books were activated and defendant’s work schedule, was critical to the People’s theory that the lottery books were not merely lost or misplaced but, rather, were taken and redeemed by defendant. For these reasons, we cannot conclude that there was “no reasonable possibility that the erroneously admitted evidence contributed to the conviction.”⁷⁵

2. Foundation Established for Admission of Copy of Audio Recordings

In *People v. Lee*, two controlled telephone calls were made to defendant by a confidential informant in the presence of a detective and recorded.⁷⁶

While [the detective] only heard the [informant’s] end of the conversations, he played the tapes back in order to hear the conversations in their entirety. After the original recordings on mini cassette were copied onto audio cassettes by [Organized Crime Task Force], [the detective] reviewed the audio cassettes and testified that

72. *Id.* at 1137 n.1, 887 N.Y.S.2d at 329 n.1 (citing *People v. Ely*, 68 N.Y.2d 520, 527-28, 503 N.E.2d 88, 92-93, 510 N.Y.S.2d 532, 536-37 (1986); *People v. McGee*, 49 N.Y.2d 48, 60, 399 N.E.2d 1177, 1183, 424 N.Y.S.2d 157, 163 (1979)).

73. *Id.* at 1137, 887 N.Y.S.2d at 329 (citations omitted).

74. *Id.* at 1137, 887 N.Y.S.2d at 329 (citations omitted).

75. 72 A.D.3d 1399, 1402, 900 N.Y.S.2d 195, 198 (3d Dep’t 2010).

76. 66 A.D.3d 1116, 1120, 887 N.Y.S.2d 302, 306 (3d Dep’t 2009).

they matched the recordings of the conversations taken on February 11, 2005.⁷⁷

The Third Department held that the detective's testimony provided sufficient foundation for the admission of the copies of the audiotapes, and that their admission "did not violate the best evidence rule."⁷⁸

A proper foundation was also established in *People v. Morrice*:

County court properly admitted in evidence an audiotape of a telephone conversation between defendant and the main prosecution witness despite the fact that the beginning of the audiotape was inaudible. In addition, we conclude that the prosecutor laid a proper foundation for the admission of the audiotape in evidence, and that he properly characterized the contents of the audiotape during his cross-examination of defense witnesses and on summation.⁷⁹

B. Exclusion

In *People v. Oxley*, the court held that multiple factors must be considered before evidence that one other than the accused committed the crime may be admitted:

Before permitting evidence that another individual committed the crime for which a defendant is on trial, the court is required to determine if the evidence is relevant and probative of a fact at issue in the case, and further that it is not based upon suspicion or surmise. Then, the court must balance the probative value of the evidence against the prejudicial effect to the People and may, in an exercise of its discretion, exclude relevant evidence that will cause undue prejudice, delay the trial, or confuse or mislead the jury.⁸⁰

77. *Id.*

78. *Id.*, 887 N.Y.S.2d at 306-07.

79. 61 A.D.3d 1390, 1390-91, 877 N.Y.S.2d 547, 548 (4th Dep't 2009) (citations omitted), *aff'd*, 78 A.D.3d 1534, 910 N.Y.S.2d 786 (4th Dep't 2010).

80. 64 A.D.3d 1078, 1081, 883 N.Y.S.2d 385, 389-90 (3d Dep't 2009) (citations omitted), *lv. denied*, 13 N.Y.3d 941, 922 N.E.2d 920, 895 N.Y.S.2d 331 (2010). *People v. Molina*, citing *People v. Oxley*, excluded similar testimony on hearsay grounds:

In an application to call Courtney Cade as a witness, defendant's counsel made an offer of proof that Cade would testify that a man named "Hick" told him that he had a weapon that was used in this incident, and that that weapon had a "a body on it." While this testimony is relevant as tending to "point out someone besides the [defendant] as the guilty party," Cade's testimony as to Hick's statements would constitute hearsay, and no exception under *People v Oxley* . . . exists to permit their admissibility. Unlike in *Oxley*, Hick was not available to testify and be subjected to cross-examination, and there was no other evidence tending to support his hearsay statements.

79 A.D.3d 1371, 1376, 914 N.Y.S.2d 331, 338 (3d Dep't 2010) (citing *People v. Schulz*, 4 N.Y.3d 521, 529, 829 N.E.2d 1192, 1197-98, 797 N.Y.S.2d 24, 29-30 (2005); *Oxley*, 64 A.D.3d at 1081, 883 N.Y.S.2d at 389-90).

An offer of proof precedes the admission of such evidence: “The proper procedure is for the court to allow the defense to make an offer of proof outside the jury’s presence addressing its proposed evidence of third-party culpability, allow the People to present counter-arguments, then balance the aforementioned considerations and render a definitive ruling regarding what is admissible.”⁸¹ At bar, “defendant’s proffer included testimony outside the jury’s presence, as well as defense counsel’s explanation of the proposed testimony of other witnesses.”⁸² Two witnesses testified as part of the proffer, including the individual alleged to be culpable, and the testimony of four other witnesses was explained.⁸³

The trial court rejected the offer of proof and refused to allow the defense to admit any of this evidence of third-party culpability.⁸⁴ The Third Department held this to have been an abuse of discretion, citing a United States Supreme Court decision:

In *Holmes v. South Carolina*, under similar circumstances, the United States Supreme Court reversed a conviction based upon the trial court’s improper exclusion of evidence concerning third-party culpability, thereby violating the defendant’s right to “a meaningful opportunity to present a complete defense.”

In the present case, county court followed the proper procedure by permitting the defense to make a proffer outside the presence of the jury and allowing the People to argue in opposition. The court abused its discretion, however, in denying defendant the opportunity to present his evidence which was not merely speculative, but specific and adequately connected Chase to the victim and scene so that it “tend[ed] clearly to point out someone besides [defendant] as the guilty party.” By evaluating and relying upon the strength of the People’s potential rebuttal evidence and Chase’s denial, the court usurped the jury’s role of assessing credibility and the relative strength of conflicting evidence, depriving defendant of his right to present a complete defense. The evidence proffered by defendant was relevant, specific, adequately linked Chase to the crime, and would not have resulted in unreasonable delay, prejudice to the prosecution, or confusion of the jury.⁸⁵

81. *Oxley*, 64 A.D.3d at 1081-82, 883 N.Y.S.2d at 390.

82. *Id.* at 1082, 883 N.Y.S.2d at 390.

83. *Id.*

84. *Id.*

85. *Id.* at 1082-83, 883 N.Y.S.2d at 390-91 (citing *Holmes v. South Carolina*, 547 U.S. 319, 323-24 (2006)) (citations omitted).

C. Res Ipsa Loquitur

In a personal injury action, as plaintiff pushed on a door to exit a building, the door came off its hinges and fell on him.⁸⁶ While affirming the trial court's dismissal of plaintiff's claims premised on actual and constructive notice, the Fourth Department reversed the dismissal of plaintiff's case premised on *res ipsa loquitur*.⁸⁷ Reviewing each of the three elements of a *res ipsa loquitur* claim, the appellate court concluded that summary judgment and dismissal was not warranted:

We agree with the First Department that a door mounted on hinges would not generally fall when opened, in the absence of someone's negligence. Furthermore, the record establishes that there is a question of fact whether the instrumentality, i.e., the door, was within the exclusive control of defendants. Plaintiff merely opened the door, and thus he is not liable for the accident. Although defendants presented evidence that a witness believed that a gust of wind caught the door, causing it to separate from the frame, plaintiff "need not conclusively eliminate the possibility of all other causes of the [accident]" in order to rely on the doctrine of *res ipsa loquitur* in presenting the issue of negligence to the trier of fact.⁸⁸

D. Cross-Examination

In *People v. Caba*, the Third Department held that permitting the prosecutor to cross-examine an important fact witness "regarding the fact that the oath had been administered to him by clerk using book that ostensibly was not sacred to that witness's particular religion" was error.⁸⁹ Inquiry on the topic:

[W]as pursued further on re-direct and then by county court, [and] veered too far into an impermissible discussion in front of the jury of various aspects of witness's religious beliefs. This line of questioning by the prosecutor was directed at the witness's credibility. "With limited exceptions not relevant here, any attempt to discredit or otherwise penalize a witness because of his [or her] religious beliefs or for the exercise of his [or her] right to affirm the truth of his [or her] testimony is improper, because those factors are irrelevant to the issue of credibility."⁹⁰

86. *Brink v. Anthony J. Costello & Son Dev., LLC*, 66 A.D.3d 1451, 1452, 886 N.Y.S.2d 301, 302 (4th Dep't 2009).

87. *Id.*

88. *Id.* at 1452-53, 886 N.Y.S.2d at 302 (citations omitted).

89. 66 A.D.3d 1121, 1123, 887 N.Y.S.2d 709, 711 (3d Dep't 2009).

90. *Id.* (citation omitted).

How could the prosecutor have approached the issue?

An oath or affirmation is sufficient if “administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his [or her] religious or ethical beliefs.” If the prosecutor was concerned that the oath administered by the clerk to this witness was insufficient because the clerk did not produce a book sacred to the witness’s religion, the appropriate approach would have been to request questioning of the witness outside the presence of the jury to determine whether he had been impressed with his duty to testify truthfully.⁹¹

People v. Caba was cited later in the *Survey* year by the dissent in *In re State v. Andrew O.*,⁹² a proceeding to determine whether the respondent was a dangerous sex offender who should be confined to a secure treatment facility.⁹³ The respondent presented testimony of an expert, Kriegman, who “concluded that [the] respondent [did] not suffer from a mental abnormality as . . . defined under Mental Hygiene Law article 10.”⁹⁴ The expert was cross-examined extensively, and effectively, by the petitioner’s attorney.⁹⁵ However, the majority found that the portion of the cross-examination based upon the witness’s religious beliefs, specifically in Yoism, a religion founded by the witness, was improper, but did not warrant a new trial:

While we fully join in the dissent’s recognition that interjection of a party’s religious beliefs or observances has no place in either a criminal or civil trial, we cannot agree with its conclusion that a new trial is warranted in this case. Although petitioner briefly questioned Kriegman regarding his founding of Yoism and its beliefs, the balance of petitioner’s extensive cross-examination, as previously described, severely undermined Kriegman’s credibility as well as the factual basis for his opinion that respondent suffered a mental abnormality. In light of this, we conclude that the objectionable questioning regarding Yoism, within the context of the entire trial, did not substantially influence the jury’s verdict.⁹⁶

The dissenting justice disagreed about the impact of the improper questioning:

91. *Id.* at 1123-24, 887 N.Y.S.2d at 711 (citations omitted).

92. 68 A.D.3d 1161, 1169, 890 N.Y.S.2d 667, 675 (3d Dep’t 2009) (Rose, J., dissenting), *lv. granted*, 14 N.Y.3d 706, 926 N.E.2d 260, 899 N.Y.S.2d 755 (2010), *rev’d*, No. 34, 2011 WL 1233579 (Apr 5, 2011).

93. *Id.* at 1162, 890 N.Y.S.2d at 669.

94. *Id.* at 1165, 890 N.Y.S.2d at 671.

95. *Id.* at 1166, 890 N.Y.S.2d at 672.

96. *Id.* (citations omitted).

Despite repeated objections from respondent's counsel, supreme court allowed petitioner to extensively question psychologist Daniel Kriegman regarding his religious beliefs and affiliation with a particular religion. Counsel asked, among other things, whether Kriegman's religion is an on-line religion, whether he had founded it and whether any sports stars were considered to be saints, thereby emphasizing its differences from the religions with which the jurors would likely have been familiar. Even though this questioning was patently irrelevant to any issue in the proceeding, petitioner's counsel cited it as an important part of Kriegman's life experience and repeatedly stressed that it played a role in his professional opinions. Such questioning can only be viewed as an improper attempt to challenge Kriegman's credibility based upon his religious beliefs and such a tactic has no place in either a civil or a criminal trial. In addition, because Kriegman's testimony was central to respondent's defense to the grounds for civil confinement presented by petitioner, I cannot agree with the majority that this error could not have substantially influenced the jury's verdict. Accordingly, I would reverse supreme court's order and remit the matter for a new jury trial.⁹⁷

E. Destruction of Electronically Stored Information

Judge Shira Scheindlin of the Southern District of New York, already well known in the world of electronic disclosure and evidence, has written a paradigmatic decision that seems destined to become a model for best practices in these areas.⁹⁸

In *Pension Committee*, an action brought by investors of two liquidated hedge funds, Judge Scheindlin was confronted by motions for sanctions brought by the defendants against thirteen of ninety-six plaintiffs based upon allegations that "each plaintiff failed to preserve and produce documents—including those stored electronically—and submitted false and misleading declarations regarding their document collection and preservation efforts."⁹⁹

Titling her opinion "*Zubulake* Revisited: Six Years Later," Judge Scheindlin took care to organize the opinion in a manner that made following the complicated issues involving a multitude of parties, each of whose conduct needed to be evaluated individually, a fairly

97. *Caba*, 68 A.D.3d at 1169-70, 890 N.Y.S.2d at 674-675 (Rose, J., dissenting) (citations omitted).

98. See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC (*Pension Committee*), No. 05 Civ. 9016 (SAS), 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010).

99. *Id.* at *2-3, *5.

straightforward proposition.¹⁰⁰ To accomplish this, the opinion was organized under the following headings:

I. INTRODUCTION

II. AN ANALYTICAL FRAMEWORK AND APPLICABLE LAW

- A. Defining Negligence, Gross Negligence, and Willfulness in the Discovery Context
- B. The Duty to Preserve and Spoliation
- C. Burdens of Proof
- D. Remedies

III. PROCEDURAL HISTORY

IV. PLAINTIFFS' EFFORTS AT PRESERVATION AND PRODUCTION

V. DISCUSSION

- A. Duty to Preserve and Document Destruction
- B. Culpability
- C. Relevance and Prejudice
- D. Individual Plaintiffs
 - 1. Plaintiffs that Acted in a Grossly Negligent Manner
 - a. 2m
 - b. Hunnicutt
 - c. Coronation
 - d. The Chagnon Plaintiffs
 - e. Bombardier Trusts
 - f. The Bombardier Foundation
 - 2. Plaintiffs that Acted in a Negligent Manner
 - a. The Altar Fund
 - b. L'Ecole Polytechnique
 - c. Okabena
 - d. The Corbett Foundation
 - e. Commonfund
 - f. KMEFIC
 - g. UM

E. Sanctions

VI. CONCLUSION¹⁰¹

The organization of the opinion is useful both for the framework it offers for understanding the issues surrounding electronic disclosure

100. *Id.* at *1.

101. *See generally id.*

sanctions generally and in the case at bar, and for furnishing a model for future litigants to structure arguments for and against such sanctions.

The legal standards for the preservation and production of electronically stored information, and the procedural framework, burdens of proof, and range of remedies set forth in the opinion represent the synthesis and distillation of Judge Scheindlin's *Zubulake* decisions, and will be familiar to practitioners in the arena of electronic litigation.¹⁰²

One aspect of the opinion requires the careful construction of a chronology for past preservation and production efforts.¹⁰³ *Pension Committee* was originally commenced in the Southern District of Florida in 2004 and was transferred to the Southern District of New York in October of 2005 following defendants' successful motion to transfer venue.¹⁰⁴ Judge Scheindlin identified a moment in time when a litigant's preservation obligations in the Southern District of New York became fixed:

After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.¹⁰⁵

Earlier in the opinion, Judge Scheindlin offered two alternative trigger times, one where the preservation obligations attached, and one where the obligation to issue a written litigation hold attaches:

Applying these terms in the discovery context is the next task. Proceeding chronologically, the first step in any discovery effort is the preservation of relevant information. A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful. For example, the intentional destruction of

102. Readers may want to start with the fifth and final *Zubulake* decision, referred to as *Zubulake V*, found at *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2005).

103. *Pension Committee*, 2010 U.S. Dist. LEXIS 4546, at *10-12.

104. *Id.* at *48-50.

105. *Id.* at *32.

relevant records, either paper or electronic, after the duty to preserve has attached, is willful. Possibly after October, 2003, when *Zubulake IV* was issued, and definitely after July, 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.¹⁰⁶

Further on in the opinion, Judge Scheindlin addressed the fact that the *Pension Committee* action originated in Florida, and was thereafter transferred to New York, vis-a-vis the time when the preservation obligations at issue became fixed in the case:

The age of this case requires a dual analysis of culpability—plaintiffs’ conduct before and after 2005. The Citco Defendants contend that plaintiffs acted willfully or with reckless disregard, such that the sanction of dismissal is warranted. Plaintiffs admit that they failed to institute written litigation holds until 2007 when they returned their attention to discovery after a four year hiatus. Plaintiffs should have done so no later than 2005, when the action was transferred to this District. This requirement was clearly established in this District by mid-2004, after the last relevant *Zubulake* opinion was issued. Thus, the failure to do so as of that date was, at a minimum, grossly negligent. The severity of this misconduct would have justified severe sanctions had the Citco Defendants demonstrated that any documents were destroyed *after* 2005. They have not done so. It is likely that most of the evidence was lost before that date due to the failure to institute written litigation holds.¹⁰⁷

In a footnote, Judge Scheindlin noted that, “[w]hile a duty to preserve existed in the Southern District of Florida when the case was filed, no . . . Eleventh Circuit [district court] articulated a ‘litigation hold’ requirement until 2007.”¹⁰⁸

Pension Committee will, no doubt, be referenced and cited in New York State court briefs and decisions. However, the time when the preservation obligation and the obligation to issue a written litigation hold in New York State courts is fixed will require independent analysis, and may ultimately yield different dates in the courts of the different appellate divisions.

F. Role of Counsel Representing Non-Party at Deposition to Preserve Trial Testimony

In a medical malpractice action, plaintiff’s counsel deposed several

106. *Id.* at *10.

107. *Id.* at *48-49.

108. *Pension Committee*, 2010 U.S. Dist. LEXIS 4546, at *49 n.90.

treating physicians to preserve their testimony for trial pursuant to Uniform Rule 202.15.¹⁰⁹ During the videotaped depositions, counsel for the non-party physician made repeated objections to, inter alia, form and relevance.¹¹⁰ Plaintiff's counsel objected to the actions of the attorney representing the witness, but no agreement could be reached during the deposition.¹¹¹ The deposition was suspended, and plaintiff's counsel "moved for an order 'precluding . . . Dr. Godishala's counsel from objecting at the videotaped trial testimony except as to privileged matters or in the event that she were to deem questioning to be abusive or harassing.'"¹¹²

The Fourth Department memorandum decision addressed both the conduct of the attorney representing the non-party and the relief fashioned by the trial court:

In its order deciding the motion, supreme court directed that plaintiff and defendants are to "consider providing general releases to the [physicians] . . . with respect to their initial treatment of [plaintiff]" and that, if such releases are provided, plaintiff will "be entitled to have a videotaped deposition of [the physicians] during which deposition the attorneys for the [physicians] shall not be permitted to speak . . ." The order further provided that, if the general releases are not provided, then the attorneys for the parties and the physicians "shall seek to work out ground rules for a non-party deposition" of the physicians. The order then provided that, if the attorneys are unable to "work out ground rules," plaintiff will not be entitled to take the videotaped depositions of the physicians and they "are to be subpoenaed to testify" at trial.

We agree with plaintiff that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition. CPLR 3113(c) provides that the examination and cross-examination of deposition witnesses "shall proceed as permitted in the trial of actions in open court." Although counsel for the physicians correctly conceded at oral argument of plaintiff's motion in supreme court that she had no right to object during or to participate in the trial of this action, she nevertheless asserted that she was entitled to object during nonparty depositions and videotaped deposition questioning. We cannot agree that there is such a distinction, based on the express language of CPLR 3113(c). Indeed, we discern no distinction between trial testimony and pre-trial videotaped deposition testimony

109. *Thompson v. Mather*, 70 A.D.3d 1436, 1437, 894 N.Y.S.2d 671, 672 (4th Dep't 2010).

110. *Id.*

111. *Id.*

112. *Id.*

presented at trial. We note in addition that 22 NYCRR 202.15, which concerns videotaped recordings of civil depositions, refers only to objections by the parties during the course of the deposition in the subdivision entitled "Filing and objections." We thus conclude that plaintiff is entitled to take the videotaped depositions of the physicians and that counsel for those physicians is precluded from objecting during or otherwise participating in the videotaped depositions.

Lastly, we note that the practice of conditioning the videotaping of depositions of nonparty witnesses to be presented at trial upon the provision of general releases is repugnant to the fundamental obligation of every citizen to participate in our civil trial courts and to provide truthful trial testimony when called to the witness stand. Contrary to nonparty respondents' contention, the fact that the statute of limitations has not expired with respect to a nonparty treating physician witness for the care that he or she provided to a plaintiff provides no basis for such a condition.¹¹³

The Fourth Department, while citing to the CPLR and Uniform Rules, offered no case citation in support of its holding.¹¹⁴ Objections to relevance would not normally be permitted during the course of a deposition under the deposition rules set forth in Uniform Rules Part 221, and the counsel representing the parties at the deposition clearly have an incentive to make any necessary objections to form, just as they would at trial while opposing counsel is questioning any witness.¹¹⁵ However, there are questions that potentially invade a privilege, such as medical questions of the witness that exceed the scope of the waiver of the medical privilege in the case. Additionally, the witness could be asked questions that could lead to an answer that incriminates the witness, such as questions directed to, for example, fraud in billing for medical services. Can the attorney representing the non-party witness be prevented from asserting those privileges on behalf of the non-party witness client at a deposition? The holding and unequivocal language in *Thompson* suggests this result.

The deposition rules contained in Uniform Rules Part 221 permit counsel to confer with the witness in order to determine whether to assert a privilege:

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section

113. *Id.* at 1437-38, 894 N.Y.S.2d at 672-73 (citation omitted).

114. *See Thompson*, 70 A.D.3d at 1437-38, 894 N.Y.S.2d at 672-73.

115. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 221.1-221.3 (2006).

221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.¹¹⁶

The rules also permit counsel to direct the witness not to answer a question that invades a privilege: “[a] deponent shall answer all questions at a deposition, except: (a) to preserve a privilege or right of confidentiality.”¹¹⁷

The Fourth Department’s holding in *Thompson* is reminiscent of an early (albeit pre-deposition rules) case, *Spatz v. World Wide Travel Service, Inc.*, where the court announced: “Counsel is without authority to direct a witness to refuse to answer questions at an examination before trial.”¹¹⁸ Like *Thompson*, *Spatz* offered no case citation for this proposition, yet most attorneys, confronted with a warning that *Spatz* did not permit an attorney to direct a witness not to answer a question, continued to do so.¹¹⁹ The deposition rules do not mention non-party witnesses or their counsel.¹²⁰ Since counsel for the parties do not have a duty, or very often a motivation, to assert a privilege for the non-party witness, fairness would appear to require that the attorney defending the non-party witness be permitted to do so.

III. PRESUMPTIONS

A. Motor Vehicle Permissive Use

New York Vehicle and Traffic Law section 388 creates a strong presumption regarding negligence attributable to a motor vehicle owner.¹²¹ How strong? In *Amex Assurance Co. v. Kulka*, the court stated that:

“Vehicle and Traffic Law [section] 388 creates a ‘strong presumption’ of permissive use which can only be rebutted with substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner’s express or implied permission.” “The uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her permission, does not, by itself, overcome the presumption of permissive use.” Additionally, “[i]f the evidence produced to show that no permission has been given has been contradicted or, because of improbability, interest of the witnesses or other weakness, may reasonably be disregarded by the

116. 22 NYCRR 221.3.

117. 22 NYCRR 221.2.

118. 70 A.D.2d 835, 836, 418 N.Y.S.2d 19, 21 (1st Dep’t 1979).

119. See generally *id.* at 835-36, 418 N.Y.S.2d at 20-21.

120. See 22 NYCRR 221.1-221.3.

121. See generally N.Y. VEH. & TRAF. LAW § 388 (McKinney 2005).

jury, its weight lies with the jury.’”¹²²

The Second Department held that defendants, a stepmother and her stepson, “failed to sufficiently rebut the strong presumption pursuant to Vehicle and Traffic Law section 388 that [the stepson] was operating the vehicle [provided to the mother by her employer] with permission” from the employer and stepmother while his parents were out of town.¹²³ Accordingly, the trial court properly determined that the employer and stepmother “failed to establish their prima facie entitlement to judgment as matter of law” in an action arising out of the accident that occurred when the stepson was driving the vehicle.¹²⁴ Since the father “was neither the owner of the vehicle, nor the owner’s employee to whom the vehicle had been entrusted . . . , the presumption of permissive use by [the stepson] . . . had no application as to him” and he was entitled to summary judgment dismissing the complaint as against him.¹²⁵

B. Regularity

In an article 78 proceeding brought by a police chief to review a determination by a village board of trustees terminating his employment, the police chief’s unsubstantiated claims that the board failed to review the record were insufficient to overcome the presumption of the regularity of the board’s determination.¹²⁶ The Third Department stated:

[W]e are unpersuaded that the Board’s determination should be invalidated based upon petitioner’s conclusory assertions that the Board must have failed to review the record given its size and the fact that [the hearing officer’s] report and recommendation was received one day before the Board voted on it. We first note that determinations made by the Board are entitled to a presumption of regularity. As such, in order to meet his evidentiary burden on this claim, petitioner must show that the Board “made no independent appraisal and reached no independent conclusion.” “Contrary to petitioner’s contention, [the Board] was not required to read all . . . pages of the hearing transcript and each document submitted.” Thus, petitioner’s unsubstantiated claims that the Board failed to review the

122. 67 A.D.3d 614, 615, 888 N.Y.S.2d 577, 579 (2d Dep’t 2009) (citations omitted).

123. *Id.*

124. *Id.* at 615, 888 N.Y.S.2d at 579.

125. *Id.* at 615-16, 888 N.Y.S.2d at 579.

126. *Perryman v. Vill. of Saranac Lake*, 64 A.D.3d 830, 831, 835-36, 881 N.Y.S.2d 693, 694, 697-98 (3d Dep’t 2009).

record are insufficient to overcome the presumption of regularity.¹²⁷

C. Mailing

In an action to collect rents, defendant sought to serve a late answer after plaintiff moved for default, and the trial court granted the default motion.¹²⁸ On appeal, defendant challenged, *inter alia*, the default judgment, which the Third Department considered since defendant had appeared and contested the entry of judgment, but affirmed the trial court:

Upon review, we agree that plaintiffs adequately supported their application for a default judgment with “proof of service of the summons and the complaint, . . . proof of the facts constituting the claim, the default and . . . [p]roof of mailing the notice required by [CPLR 3215(g)(4)(i)].” The affidavit of plaintiffs’ counsel established the proof of service requirements, as well as defendant’s default and plaintiffs’ mailing of the notice required by CPLR 3215(g). Contrary to defendant’s claim, service on the Secretary of State pursuant to Business Corporation Law section 306(b)(1) is a valid method; defendant’s uncorroborated denial that it never received notice in time to defend is insufficient to rebut the presumption that it received a properly mailed letter, and is belied by defendant’s motion to disqualify plaintiffs’ counsel in this action, a motion made within its time to answer.¹²⁹

D. Presumption of Good Faith

The New York State Attorney General “enjoys a presumption that he is [acting] in good faith.”¹³⁰

In a motion to quash a subpoena, that presumption extends to the relevance of the subpoena served by the Attorney General’s Office, to wit, “that he is acting in good faith and, thus, need only show that the documents he seeks bear some reasonable relationship to the subject matter of a legitimate investigation.”¹³¹

E. Parol Evidence

[T]here is a “heavy presumption that a deliberately prepared and

127. *Id.* at 835-36, 881 N.Y.S.2d at 697-98 (citations omitted).

128. 333 Cherry LLC v. N. Resorts, Inc., 66 A.D.3d 1176, 1176-77, 887 N.Y.S.2d 341, 343 (3d Dep’t 2009).

129. *Id.* at 1177-78, 887 N.Y.S.2d at 343-44 (citations omitted) (emphasis omitted).

130. *In re Roemer v. Cuomo*, 67 A.D.3d 1169, 1171, 888 N.Y.S.2d 669, 671 (3d Dep’t 2009) (citations omitted).

131. *In re Hogan v. Cuomo*, 67 A.D.3d 1144, 1144-46, 888 N.Y.S.2d 665, 666-67 (3d Dep’t 2009) (citations omitted).

executed written instrument manifest[s] the true intention of the parties” and a “correspondingly high order of evidence is required to overcome that presumption.” Thus, “[t]he proponent of reformation must show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties.”¹³²

In *Resort Sports Network Inc. v. PH Ventures III, LLC*, the “no uncertain terms” element was missing:

Here, defendants do not show what the parties really agreed to “in no uncertain terms.” First and foremost, to have reformation based on mutual mistake, the mistake must be just that—mutual. Here, all defendants can point to is a unilateral mistake of Advent’s. There is no showing that RSN misunderstood Section 2.4 of the merger agreement, a provision that *defendants* (through Advent) drafted. Indeed, that RSN invoiced Advent shortly after the merger indicates that RSN was fully aware of the provision and its implications.¹³³

In *De Paulis Holding Corp. v. Vitale*, parol evidence was admitted where a deed was ambiguous despite a precise metes and bounds description of the property to be conveyed.¹³⁴ “At the end of the printed metes and bounds language . . . there [was a] handwritten and initialed notation” that the premises to be conveyed were the same premises conveyed by the grantors in a deed recorded elsewhere, which did not cover part of the area described in the metes and bounds description, so that there was an ambiguity on the face of the deed.¹³⁵ “Additionally, there [was] a suspect handwritten, but not initialed, notation at the end of the . . . deed” adding the disputed property to the printed description.¹³⁶ Finally, the deed description of the premises created ambiguity.¹³⁷

IV. HEARSAY

A. Unavailability of Witness

In *People v. Oxley*, testimony by a witness at a preliminary hearing was properly admitted into evidence, where the witness died shortly after the hearing rendering him unavailable for trial, “[b]ecause an adequate opportunity for cross-examination was provided at the hearing,

132. *Resort Sports Network Inc. v. PH Ventures III, LLC*, 67 A.D.3d 132, 135-36, 886 N.Y.S.2d 5, 7-8 (1st Dep’t 2009) (citations omitted).

133. *Id.* at 136, 886 N.Y.S.2d at 8.

134. 66 A.D.3d 816, 817-18, 889 N.Y.S.2d 191, 193-94 (2d Dep’t 2009).

135. *Id.* at 818, 889 N.Y.S.2d at 194.

136. *Id.*

137. *Id.*

and any limitations were due to defendant's failure to fully avail himself of that opportunity"¹³⁸ As to the ability to impeach the unavailable witness, "[t]he trial court has discretion to permit or limit impeachment of an unavailable witness whose testimony is admitted into evidence."¹³⁹

The Third Department held that the trial court properly exercised its discretion: "[w]hile the court here limited defendant's impeachment of [the witness], the court admitted certificates of conviction and some testimony that tended to impeach [the witness] but was admissible on other issues."¹⁴⁰

B. Declaration Against Penal Interest

The *Oxley* court also held that where a defendant sought to establish that another person committed the crime charged, and that person had made statements inculcating himself in the crime, the statements were, nonetheless, hearsay, and had to fall within an exception to the hearsay rule or the defendant had to demonstrate that the application of the hearsay rule violated the defendant's right to a fair trial:

The elements of the exception for declarations against penal interest were not met here because [the inculcated person] was available to give testimony and actually testified, albeit outside the jury's presence. Thus, a strict application of the hearsay rule would prevent admission of [the inculcated person's] statements. The United States Supreme Court has held that even where an evidentiary ruling was correct under the state's evidentiary rule, the court should still consider whether that evidentiary rule is "arbitrary" or "disproportionate to the purposes [it is] designed to serve" such that its application "infringed upon a weighty interest of the accused." As applied here, New York's common-law exception to the hearsay rule for declarations against penal interest would permit the admission of [the inculcated person's] statements only if he asserted his Fifth Amendment right and refused to testify—making him unavailable—but those statements are deemed inadmissible under this particular exception if he testifies that he never made the statements. Yet the ability to challenge those statements through cross-examination when the witness testifies provides a better opportunity to test or assure their credibility.

138. 64 A.D.3d 1078, 1081, 883 N.Y.S.2d 385, 389 (3d Dep't 2009) (citations omitted), *lv. denied*, 13 N.Y.3d 941, 922 N.E.2d 920, 895 N.Y.S.2d 331 (2010).

139. *Id.*

140. *Id.*

Here, supported by the relevant non-hearsay evidence, the hearsay testimony proffered by defendant “bore persuasive assurances of trustworthiness” and was critical to his defense. “In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.” Indeed, this Court has held that where a “statement is exculpatory as to [a] defendant, a less exacting standard applies” in determining whether statements against penal interest are admissible, and “where the statement forms a critical part of the defense, due process concerns may tip the scales in favor of admission.” Given the importance of [the inculpatated person’s] statements to the defense, the other evidence supporting those statements, and [the inculpatated person’s] availability to testify and test the credibility of those statements, exclusion of those statements infringed on defendant’s weighty interest in presenting exculpatory evidence, thus depriving him of a fair trial. Because the evidence of third-party culpability was improperly excluded, defendant is entitled to a new trial.¹⁴¹

C. *Present Sense Impression*

In a manslaughter prosecution:

[T]he court properly admitted . . . the victim’s statements made immediately prior to the shooting [where] . . . [a] witness for the People testified that she heard the victim say to defendant, “Boy, put this thing down. You don’t know if it has a safety on it or not.” [And] [s]hortly thereafter, the witness heard a gunshot in the victim’s apartment. The statements constitute[d] a present sense impression, because they were made while the declarant was perceiving “the event as it was unfolding,” and they were sufficiently corroborated by defendant’s statement to the police.¹⁴²

In *Jara v. Salinas-Ramirez*, plaintiff’s deposition testimony regarding the involvement of defendant’s van in a traffic accident was admissible under the “‘present sense impression’ exception to the hearsay rule” where:

Plaintiff testified at deposition that after being hit by a dark-colored van . . . he was approached by . . . a man and woman [And the] testimony regarding the statements allegedly made by the two witnesses identifying the license plate number of the offending vehicle

141. *Id.* at 1081-84, 883 N.Y.S.2d at 389-92 (citations omitted).

142. *People v. Jones*, 66 A.D.3d 1442, 1443, 885 N.Y.S.2d 822, 823 (4th Dep’t 2009) (citing *People v. Vasquez*, 88 N.Y.2d 561, 574-76, 670 N.E.2d 1328, 1334-35, 647 N.Y.S.2d 697, 703-04 (1996)), *lv. denied*, 13 N.Y.3d 939, 922 N.E.2d 919, 895 N.Y.S.2d 330 (2010).

was sufficiently corroborated by [plaintiff's] other testimony, accurately describing the offending vehicle as a dark-colored van and asserting that the woman made her statement to the police at the scene of the accident ten minutes after the accident.¹⁴³

D. Business Record Exception

Next year's *Survey* will, no doubt, discuss the Court of Appeals' decision in *People v. Ortega*, where the Court, with two thoughtful concurring opinions, examined the business record rule.¹⁴⁴ The majority opinion explained the business records exception:

Under the business records exception to the hearsay rule, "[a]ny writing or record . . . made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter."¹⁴⁵

This exception applies to criminal proceedings through Criminal Procedure Law section 60.10.

Generally, business records are deemed trustworthy both because they reflect routine business operations and because the person making the particular entry has the responsibility to keep accurate records that can be relied upon for business purposes. [And] [h]ospital records . . . reflect the condition of a patient who has the clear motivation to report accurately. Hospital records fall within the business records exception when they "reflect[] acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects of . . . [the particular patient's] hospitalization." Where details of how a particular injury occurred are not useful for purposes of medical diagnosis or treatment, they are not considered to have been recorded in the regular course of the hospital's business.¹⁴⁶

CPLR 4518(a) sets forth the foundation requirements for the admission of a business record:

143. 65 A.D.3d 933, 933-34, 885 N.Y.S.2d 286, 287-88 (1st Dep't 2009).

144. 15 N.Y.3d 610, 942 N.E.2d 210, 917 N.Y.S.2d 1 (2010); *see id.* at 620-22, 942 N.E.2d at 216-18, 885 N.Y.S.2d at 7-9 (Smith, J., concurring); *id.* at 622-24, 942 N.E.2d at 218-19, 885 N.Y.S.2d at 9-10 (Pigott, J., concurring).

145. *Id.*

146. *Id.* at 616-17, 942 N.E.2d at 213-14, 885 N.Y.S.2d at 4-5 (citations omitted).

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.¹⁴⁷

In *People v. Burdick*, defendant was charged with stealing lottery tickets, and objected at trial to the admission into evidence of two New York State Lottery reports:

We do, however, agree with defendant's assertion that county court erred in admitting into evidence the two New York State Lottery activation and winners reports under the business records exception to the hearsay rule. As these hearsay reports were admitted, over objection, for the truth of their contents—that specific lottery tickets were redeemed at specific times and places—they were admissible only if the foundational requirements of CPLR 4518(a) were met. To admit a document offered as a business record under CPLR 4518, it must be established that the record was made in the regular course of business, that it was the regular course of business to make such record and that the record was made contemporaneously or within a reasonable time after the act, transaction, occurrence or event being recorded.

Here, Baker [the general manager of Taylors Mini Marts where the lottery tickets were sold] provided the only foundational testimony for the admission of the two New York State Lottery reports. Although she testified that she requested, received and filed these two reports in the normal course of Taylor's business, "the mere filing of papers received from other entities, even if they are retained in the regular

147. N.Y. CPLR 4518(a); see N.Y. STATE TECH. LAW § 302(2) (McKinney Supp. 2011).

course of business, is insufficient to qualify the documents as business records,” because “[s]uch papers simply are not made in the regular course of business of the recipient, who is in no position to provide the necessary foundation testimony.” Notably, Baker did not purport to have knowledge of the business practices and record-keeping procedures of the New York State Lottery, the entity that produced the records. As such, no testimony was presented that the records were made in the regular course of the New York State Lottery’s business, that it was in the regular course of the New York State Lottery’s business to make the records, or as to when the records were made. Thus, county court erred in admitting the reports without proper foundation.¹⁴⁸

The foundation requirements of CPLR 4518(a) must be satisfied for a business record to be considered proof in admissible form.¹⁴⁹ In a legal malpractice action, defendant moved for summary judgment, which was granted by the trial court.¹⁵⁰ The First Department reversed, holding that defendant failed to demonstrate prima facie entitlement to summary judgment because, inter alia, it failed to offer certain business records offered in support of the motion in admissible form:

Defendant also failed to establish as part of his prima facie case that plaintiff was legitimately terminated from WFI and not benched. This is the critical issue, because if plaintiff can establish at trial that he was benched, a jury may conclude that defendant breached his duty to plaintiff by not petitioning for an extension of plaintiff’s visa. However, defendant did not submit the affidavit of anyone with personal knowledge of what caused plaintiff not to work between August 1999 and December 2000. Instead, defendant relied entirely on the WFI employment records. However, those records were inadmissible despite having been “certified,” as the certification did not, by itself, meet the requirements of CPLR 4518(a), i.e., show that the records were made in the ordinary course of business, that it was the ordinary course of WFI’s business to make such records, and that the records were made at the time of plaintiff’s separation from WFI or within a reasonable time thereafter. Accordingly, they were hearsay.¹⁵¹

148. 72 A.D.3d 1399, 1399-1402, 900 N.Y.S.2d 195, 196-98 (3d Dep’t 2010) (citations omitted); *see* N.Y. CPLR 4518(a).

149. N.Y. CPLR 4518(a).

150. *Suppiah v. Kalish*, 76 A.D.3d 829, 829-31, 907 N.Y.S.2d 199, 200-01 (1st Dep’t 2010).

151. *Id.* at 832, 907 N.Y.S.2d at 202.

E. Res Gestae

In a prosecution for criminal sale of a controlled substance, there was:

[N]o error in [the] supreme court's determination to permit the [confidential informant] to testify about his telephone conversation with defendant in which the [confidential informant] inquired about purchasing heroin directly from defendant rather than through an intermediary. [Because] the court properly determined that the conversation constituted "negotiations or res gestae or attempted transactions." Inasmuch as the conversation was relevant to establish "defendant's scheme or plan or modus operandi, an alleged drug transaction which involved an accomplice as an agent of the alleged seller," we decline to disturb supreme court's determination.¹⁵²

F. Business Records

In a prosecution for criminal possession of a forged instrument, the:

County court erred in admitting in evidence a printout of electronic data that was displayed on a computer screen when defendant presented a check, the allegedly forged instrument, to a bank teller. The People failed to establish that the printout falls within the business records exception to the hearsay rule, which applies here. The People presented no evidence that the data displayed on the computer screen, resulting in the printout, was entered in the regular course of business at the time of the transaction. [And] the bank teller who identified the computer screen printout testified that "anyone [at the bank] can sit down at a computer and enter information."¹⁵³

The court concluded that "[b]ecause the computer screen printout was the only evidence establishing the identity of the purported true account owner upon which the check was drawn, . . . the evidence is legally insufficient to support the conviction."¹⁵⁴

In a prosecution for aggravated unlicensed operation of a motor vehicle, an

"Affidavit of Regularity/Proof of Mailing" (affidavit) prepared by an employee of the Department of Motor Vehicles (DMV) constituted testimonial evidence that did not fall within the business records exception to the hearsay rule[.][where] [t]he affidavit served as a

152. *People v. Marshall*, 65 A.D.3d 710, 710-12, 884 N.Y.S.2d 494, 496-98 (3d Dep't 2009), *lv. denied*, 13 N.Y.3d 940, 922 N.E.2d 919, 895 N.Y.S.2d 330 (2010).

153. *People v. Manges*, 67 A.D.3d 1328, 1329, 889 N.Y.S.2d 341, 341 (4th Dep't 2009) (citing N.Y. CPLR 4518(a); N.Y. CRIM. PROC. LAW § 60.10 (McKinney 2003)).

154. *Id.*, 889 N.Y.S.2d at 342.

“direct accusation of an essential element of the crime” and, . . . was the only evidence suggesting that defendant had the requisite notice of his driver’s license suspensions[,] [and where] [d]efendant’s opportunity to cross-examine a DMV employee who was not directly involved in sending out suspension notices and who had no personal knowledge of defendant’s driving record was insufficient to protect defendant’s Sixth Amendment right of confrontation.¹⁵⁵

In *Palisades Collection, LLC v. Kedik*, plaintiff failed to establish a proper foundation for admission of “a printed copy of several pages from an electronic spreadsheet listing defendant’s . . . account as one of the accounts sold to plaintiff,” under the business records exception to the hearsay rule, because:

Although plaintiff’s agent averred that the spreadsheet was kept in the regular course of business and that the entries therein were made in the regular course of business, the agent did not establish that he was familiar with plaintiff’s business practices or procedures, and he further failed to establish when, how, or by whom the electronic spreadsheet submitted in paper form was made.¹⁵⁶

Further, “plaintiff’s agent failed to establish that the printed electronic spreadsheet . . . was a true and accurate representation of the electronic record kept by plaintiff.”¹⁵⁷

G. 911 Calls

In a burglary prosecution, the trial court properly admitted, under the excited utterance exception, the recording of the 911 telephone call made by the victim’s neighbor,

who lived above the victim’s apartment, [who] telephoned 911 when she heard sounds of a struggle coming from the victim’s apartment and [who] heard the victim scream [the] defendant’s name. [And] [a]fter the intruder fled, [the neighbor] went to the victim’s apartment, gave her the portable telephone she had used to call 911, and the victim, in [the neighbor’s] presence, told the 911 operator she believed defendant had broken into her apartment and attacked her.¹⁵⁸

The court upheld the admission because the “recording contained statements made by witnesses to the event as it was unfolding and during an ongoing emergency. [And] [t]he statements, . . . were

155. *People v. Darrisaw*, 66 A.D.3d 1427, 1428, 886 N.Y.S.2d 315, 315 (4th Dep’t 2009) (citations omitted).

156. 67 A.D.3d 1329, 1330-31, 890 N.Y.S.2d 230, 231 (4th Dep’t 2009).

157. *Id.* at 1331, 890 N.Y.S.2d at 231.

158. *People v. Barnes*, 64 A.D.3d 890, 891-92, 883 N.Y.S.2d 329, 330-31 (3d Dep’t 2009), *lv. denied*, 13 N.Y.3d 858, 920 N.E.2d 97, 891 N.Y.S.2d 692 (2010).

“sufficiently corroborated by other evidence” introduced at trial.”¹⁵⁹

H. *Germane to Treatment*

Next year’s *Survey* will delve into *People v. Ortega*, but readers of this year’s *Survey* may not want to wait to review Judge Smith’s discussion in his concurring opinion concerning evidence that is germane to treatment.¹⁶⁰

In *People v. Duhs*, the Second Department considered a case where the defendant was charged with child endangerment and assault in the first degree as a result of severe burn injuries sustained by his girlfriend’s three year-old son while defendant was babysitting.¹⁶¹ The court stated that:

At trial, the supreme court permitted an emergency room pediatrician who treated the child to testify that when she asked the child why he had not stepped out of the tub, the child said that the defendant “wouldn’t let me out.”

Contrary to the defendant’s argument, the testimony of the emergency room pediatrician as to the child’s statement was properly admitted into evidence. The physician testified, at a pretrial hearing, that the statement was made in response to a question she asked in order to ascertain whether the child had any neurological injury or deficit. Since the statement was thus germane to the child’s diagnosis and treatment, it falls within an exception to the rule against hearsay.

The admission of the statement also did not violate the defendant’s constitutional right to confront the witnesses against him. An out-of-court statement implicates the defendant’s Sixth Amendment rights only when it is testimonial in nature. Here, however, the statement was not testimonial, as it was elicited in furtherance of the medical treatment necessary to address the ongoing emergency caused by the child’s condition.¹⁶²

J. *Admissions*

In a personal injury action arising from a motor vehicle accident, defendant’s (the lessor) admission in its answer to the amended complaint that it “was identified as the owner [of the vehicle] on the certificate of title,” was a formal judicial admission, which was

159. *Id.* at 892, 883 N.Y.S.2d at 331.

160. 15 N.Y.3d 610, 620-22, 942 N.E.2d 210, 216-18, 917 N.Y.S.2d 1, 7-9 (2010) (Smith, J., concurring).

161. 65 A.D.3d 699, 699, 884 N.Y.S.2d 479, 480 (2d Dep’t 2009), *lv. granted*, 14 N.Y.3d 887, 929 N.E.2d 1010, 903 N.Y.S.2d 775 (2010).

162. *Id.* at 699-700, 884 N.Y.S.2d at 480-81 (citations omitted).

“conclusive of the facts admitted,” and resulted in the presumption that defendant was the owner of the vehicle, which was not rebutted, and that as the owner, defendant could be found liable for allowing the driver to operate it under the permissive use presumption.¹⁶³

In *People v. Valdes*, “a statement made by [the defendant] during the course of an argument with the brother of a witness who testified at trial . . . was admissible pursuant to the party admissions exception to the hearsay rule . . . [and] was not testimonial in nature.”¹⁶⁴

V. EXPERT WITNESSES

A. *Timing of Expert Exchanges*

1. *Experts at Trial*

Martin v. Triborough Bridge & Tunnel Authority, a First Department decision where leave was denied by the Court of Appeals, is representative of the issues, judicial considerations, and forms of relief available when an expert is exchanged late.¹⁶⁵ *Martin* is of note because, as the dissent explains, the expert called by the defense was first exchanged after plaintiff rested.¹⁶⁶

The majority opinion is relatively brief, but instructive on the issue of the factors the court considered, and steps plaintiff’s counsel could have taken to, at the very least, reduce the prejudice of the defendant’s late exchange:

The trial court properly exercised its discretion in denying plaintiff’s application to preclude TBTA from introducing the expert testimony of a professional engineer as to the cause of the accident. Preclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101(d)(1)(i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to the party seeking preclusion. Here, contrary to plaintiff’s contention, the delay of the expert disclosure was not a result of mere failure to prepare. Defense counsel explained that he was retained as trial counsel shortly before the trial, and that although he had contacted the expert soon thereafter, the expert needed additional time to do

163. *Zegarowicz v. Ripatti*, 77 A.D.3d 650, 650-53, 911 N.Y.S.2d 69, 70-72 (2d Dep’t 2010).

164. 66 A.D.3d 925, 925-26, 886 N.Y.S.2d 623, 623-24 (2d Dep’t 2009) (citations omitted).

165. 73 A.D.3d 481, 901 N.Y.S.2d 193 (1st Dep’t 2010), *lv. denied*, 15 N.Y.3d 713, 938 N.E.2d 1013, 912 N.Y.S.2d 578 (2010).

166. *Id.* at 487, 901 N.Y.S.2d at 197 (Manzanet-Daniels, J., dissenting).

research to form an opinion as to the cause of the accident. Furthermore, the expert disclosure was made about a week after the expert was retained. Under these circumstances, we cannot conclude that the delayed expert disclosure was willful.

Nor can we conclude that the delayed disclosure was prejudicial. To overcome any prejudice that may have resulted from allowing the expert to testify, the trial court gave plaintiff the opportunity to voir dire the expert to avoid any surprises during cross-examination. Although plaintiff accepted the opportunity to do so, he now contends that such a remedy did not adequately cure the prejudice because he did not have sufficient time to prepare for a cross-examination or obtain other evidence to challenge the expert's testimony. He also contends that the trial court rushed him by reminding him that the jury was waiting while he was questioning the expert. However, counsel never asked for an adjournment or additional time to prepare challenges to the expert's testimony, or to retain his own expert, and nothing in the record shows that the court interfered with or cut short counsel's voir dire of the expert in any way. Additionally, his cross-examination brought out testimony that was favorable to plaintiff on certain material issues.

In any event, even if the trial court did improvidently exercise its discretion in permitting the expert to testify, any error was harmless. Plaintiff argues that the testimony left the jury with an unchallenged expert opinion that his own negligence caused the accident. However, the jury's verdict was based on its finding of lack of negligence on TBTA's part, and the jury never reached the issue of plaintiff's own negligence.¹⁶⁷

Justice Manzanet-Daniels's dissenting opinion offers a *Rashomon*-like¹⁶⁸ alternative view of the trial proceedings, including defense counsel's explanation for the late exchange:

When the parties next appeared in court, on Monday, plaintiff's counsel registered an objection to the late disclosure. When the court inquired as to the reason for the late notice, defense counsel replied that the witness had just been hired and that he thought the witness' testimony would "help the jury." Counsel stated, "I thought it would be a very positive thing . . . if we had someone who knew about brakes, who was a specialist in brakes, . . . I would like the Court and

167. *Id.* at 482-83, 901 N.Y.S.2d at 193-94 (citations omitted); see N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 2005).

168. *Rashomon* is a 1950 film directed by Akira Kurosawa and starring Toshiro Mifune containing the line: "A heinous crime and its aftermath are recalled from differing points of view." INTERNET MOVIE DATABASE, www.imdb.com/title/tt0042876 (last visited Apr. 18, 2011).

the jury to know how does a 1994 Ford Explorer travel in neutral with the engine off on that decline and what would cause the vehicle . . . to lurch forward, speed up.” Over plaintiff’s objection, the court ruled that it would allow the engineer to testify.¹⁶⁹

The dissent recited the facts underlying the lawsuit:

Plaintiff herein was traveling on the Triborough Bridge when his Ford Explorer overheated. An employee of defendant Triborough Bridge and Tunnel Authority, John Georges, pushed plaintiff’s car across the bridge with his wrecker. It is undisputed that plaintiff had his car in neutral and his key in the off position when Georges began pushing him. It is also undisputed that placing a car in neutral disables the power steering and brakes, though it does not preclude manual steering and braking of the vehicle. Finally, it is undisputed that the span across which plaintiff was being pushed crested at its midpoint, and then declined as one traveled towards the Queens side of the bridge.¹⁷⁰

Clearly, the issue of the plaintiff’s vehicle’s braking ability was an issue in the case from its inception, and the majority is silent concerning the predecessor counsel’s failure to exchange an expert.¹⁷¹ It is difficult to understand the majority’s conclusion that “the delay of the expert disclosure was not a result of mere failure to prepare.”¹⁷² Nonetheless, the majority so holds, and the Court of Appeals declined to consider the case.¹⁷³

2. Experts on Summary Judgment

Having seen in *Martin* an extreme example of a post-eve-of-trial expert exchange being permitted by the trial court, a line of cases in the Second Department concerning the preclusion of expert affidavits submitted in opposition to summary judgment motions may strike readers as, at the very least, perplexing.

Two years ago the *Disclosure Survey* contained an extensive discussion of the Second Department cases,¹⁷⁴ spawned by the court’s

169. *Martin*, 73 A.D.3d at 484, 901 N.Y.S.2d at 195 (Manzanet-Daniels, J., dissenting).

170. *Id.* at 483, 901 N.Y.S.2d at 194 (Manzanet-Daniels, J., dissenting).

171. *See id.* at 482-83, 901 N.Y.S.2d at 193-94.

172. *Id.* at 482, 901 N.Y.S.2d at 193 (majority opinion).

173. *Martin v. Triborough Bridge & Tunnel Auth.*, 15 N.Y.3d 713, 938 N.E.2d 1013, 912 N.Y.S.2d 578 (2010).

174. David Paul Horowitz, *Disclosure, 2007-08 Survey of New York Law*, 59 SYRACUSE L. REV. 693, 719-23 (2009). The *Disclosure Survey* is now deceased, with some of the topics included herein.

2008 decision in *Construction by Singletree, Inc. v. Lowe*.¹⁷⁵ In *Singletree*, the Second Department held:

As it is undisputed that [defendant] failed to identify any experts in pretrial disclosure whom he intended to call to testify at trial concerning whether the work was faulty or the extent of his alleged compensatory damages arising from that breach of warranty, and did not proffer any explanation for such failure, it was not an improvident exercise of discretion for the supreme court to have determined that the specific expert opinions set forth in the affidavits submitted in opposition to the motion for summary judgment could not be considered at trial.¹⁷⁶

Last year's *Survey*¹⁷⁷ discussed *Gerardi v. Verizon New York, Inc.*,¹⁷⁸ where the Second Department held:

The plaintiff's expert affidavit should not have been considered in determining the motion since the expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and the plaintiff offered no valid excuse for his delay in identifying his expert.¹⁷⁹

Most recently, the Second Department decided *Vailes v. Nassau County Police Activity League, Inc. Roosevelt Unit*.¹⁸⁰ The appellate division reversed the trial court's grant of summary judgment and reinstated plaintiff's complaint, finding that plaintiff, in opposition to defendant's prima facie proffer, raised triable issues of fact.¹⁸¹ However, the Second Department found a proper exercise of discretion by the trial court in failing to consider the affidavit of plaintiff's expert submitted in opposition to the motion:

We agree with the defendant that the supreme court providently exercised its discretion in declining to consider the affidavit of the plaintiffs' purported expert, since that expert was not identified by the plaintiffs until after the note of issue and certificate of readiness had been filed attesting to the completion of discovery.¹⁸²

It is interesting to note that *Vailes* cites *Gerardi*, but makes no mention

175. 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dep't 2008).

176. *Id.* at 863, 866 N.Y.S.2d at 704.

177. David Paul Horowitz, *Disclosure, 2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 847, 887 n.183 (2010).

178. 66 A.D.3d 960, 888 N.Y.S.2d 136 (2d Dep't 2009).

179. *Id.* at 961, 888 N.Y.S.2d at 137-38.

180. 72 A.D.3d 804, 898 N.Y.S.2d 856 (2d Dep't 2010).

181. *Id.* at 804-05, 898 N.Y.S.2d at 856.

182. *Id.* (citation omitted).

of *Singletree*, so tracking these cases becomes a bit difficult.¹⁸³ Nonetheless, the *Singletree* holding remains alive and well in the Second Department, since *Singletree* begat *Gerardi*, and *Gerardi* begat *Vailes*.¹⁸⁴

3. *Contrasting Expert Exchange for Trial Versus Summary Judgment*

It is difficult to see how these two lines of cases can be reconciled. *Martin* is a recent example of a long line of cases where eve-of-trial expert exchanges are permitted.¹⁸⁵ The Second Department has consistently permitted such exchanges for trial.

Thus, in *Rowan v. Cross County Ski & Skate, Inc.*, and in conformity with the other appellate divisions, the Second Department held that:

CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party.¹⁸⁶

Post-*Singletree*/*Gerardi*/*Vailes*, the Second Department continues to cite *Rowan*.¹⁸⁷

Imagine that the defendant in *Vailes* did not make a summary judgment motion, either because of a timing issue arising from *Brill v. City of New York*,¹⁸⁸ or because it was determined that the motion was not meritorious. In most of the counties within the Second Department the wait for trial is a year or more. Next, imagine that a year or more later, the case is scheduled for trial, and two months before the scheduled trial date the plaintiff exchanges the same expert that would have been exchanged in opposition to the summary judgment motion, had one been made. What would be the likely result at trial

183. See *id.* at 804-05, 898 N.Y.S.2d at 856 (citing *Gerardi*, 66 A.D.3d at 961, 888 N.Y.S.2d at 137-38).

184. See Constr. by *Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dep't 2008); *Gerardi*, 66 A.D.3d at 961, 888 N.Y.S.2d at 137-38; *Vailes*, 72 A.D.3d at 805, 898 N.Y.S.2d at 856.

185. See generally *Martin v. Triborough Bridge & Tunnel Auth.*, 73 A.D.3d 481, 901 N.Y.S.2d 193 (1st Dep't 2010).

186. 42 A.D.3d 563, 564, 840 N.Y.S.2d 414, 415 (2d Dep't 2007) (citation and quotation omitted); N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 2005).

187. See, e.g., *Ocampo v. Pagan*, 68 A.D.3d 1077, 1077, 892 N.Y.S.2d 452, 454 (2d Dep't 2009).

188. 2 N.Y.3d 648, 814 N.E.2d 431, 781 N.Y.S.2d 261 (2004).

(recognizing that plaintiffs have an incrementally more difficult burden when dealing with late expert exchanges since their expert exchanges generally precede those of defendants, due to plaintiff's burden of proof)? In all likelihood the plaintiff's expert will be permitted to testify at the trial, the same expert whose affidavit a trial court could decline to consider in opposition to a summary judgment motion (which could have been made a year or more earlier in my hypothetical).

I don't get it.

B. Expert Required in Legal Malpractice Action

In *Suppiah v. Kalish*, a legal malpractice action, the trial court granted defendant's motion for summary judgment, and the First Department reversed, highlighting the movant's failure to demonstrate prima facie entitlement with proof, in admissible form, consisting, in part, of an expert's affidavit:

We reverse because defendant failed to satisfy his prima facie burden of establishing entitlement to judgment as a matter of law. The issues in this case are not part of an ordinary person's daily experience, and to prevail at trial, plaintiff will be required to establish by expert testimony that defendant failed to perform in a professionally competent manner. As this is a motion for summary judgment, the burden rests on the moving party—here, defendant—to establish through expert opinion that he did *not* perform below the ordinary reasonable skill and care possessed by an average member of the legal community. Also, defendant was required, on this motion, to establish through an expert's affidavit that even if he did commit malpractice, his actions were not the proximate cause of plaintiff's loss. By failing to submit the affidavit of an expert, defendant never shifted the burden to plaintiff.

. . . .

Contrary to defendant's contention, the issue of plaintiff's expired passport was not within the experience of an ordinary factfinder. Defendant's argument that the expired passport would have been fatal to any effort to extend the visa relies on 8 CFR 214.1(a)(3)(i), which provides, in pertinent part:

An alien applying for extension of stay must present a passport only if requested to do so by the Department of Homeland Security. The passport of an alien applying for extension of stay must be valid at the time of application for extension, unless otherwise provided in this chapter, and the alien must agree to maintain the validity of his or her passport and to abide by all the terms and conditions of his extension.

The regulation fails to state what the actual effect of this regulation

would be on a visa extension application made by an alien with an expired passport. It is unclear whether the application would be denied outright, whether the alien would be afforded an opportunity to cure the lapse (as plaintiff's expert argued without opposition), or whether there would be some different consequence. Certainly the issue is beyond the ordinary experience of a factfinder who has no familiarity with the byzantine world of immigration law. Accordingly, defendant, as the proponent of summary judgment, was required to present an expert's affidavit in order to explain exactly what the consequence would have been. His failure to do so should have compelled denial of the motion.¹⁸⁹

C. Expert Testimony Concerning Average Reaction Time

As recently as 2006, the Court of Appeals affirmed a jury verdict in favor of a concededly intoxicated plaintiff who was struck by a train while walking along a catwalk adjoining the train tracks between two stations.¹⁹⁰

In *Soto v. New York City Transit Authority*, the Court framed the issues before it:

The question presented by this appeal is whether plaintiff's reckless behavior was of such a nature as to constitute the sole legal cause of his injuries, vitiating the duty of care of a train operator. We conclude under the circumstances of this case that it was not, and that the evidence was sufficient to support the verdict. We further conclude that plaintiff's estimate of his own running speed at the time of the accident was admissible and sufficient to lay a proper foundation for plaintiff's accident reconstruction expert to use in forming his opinion.¹⁹¹

One issue in *Soto* was the plaintiff's expert's use of testimony by the plaintiff that he was running away from the train at a speed of seven or eight miles per hour in calculating whether or not the train operator had sufficient time to stop the train without hitting the plaintiff.¹⁹² The Court of Appeals explained plaintiff's expert's calculations:

Plaintiff's expert then used that estimate in making his calculations. Computing the train's stopping distance assuming the train operator

189. 76 A.D.3d 829, 832-33, 907 N.Y.S.2d 199, 202-03 (1st Dep't 2010) (quoting 8 C.F.R. § 214.1(a)(3)(i) (2010)).

190. See *Soto v. N.Y. City Transit Auth.*, 6 N.Y.3d 487, 489-94, 846 N.E.2d 1211, 1212-16, 813 N.Y.S.2d 701, 702-06 (2006). The Second Department, in a 3-2 decision, affirmed the jury verdict. *Soto v. N.Y. City Transit Auth.*, 19 A.D.3d 579, 580-81, 800 N.Y.S.2d 419, 419-21 (2d Dep't 2005).

191. *Soto*, 6 N.Y.3d at 489, 846 N.E.2d at 1212, 813 N.Y.S.2d at 702.

192. *Id.* at 490, 846 N.E.2d at 1213, 813 N.Y.S.2d at 703.

perceived the boys on the catwalk from 151.5 feet away—the distance allegedly illuminated by the train’s headlights—and factoring in reaction time, the expert determined that the train could have stopped fifty-one feet before it reached plaintiff if he had been running eight miles per hour and thirty-seven feet before it reached plaintiff if he had been running seven miles per hour.¹⁹³

The Court explained the legal basis for the defendant’s liability and affirmed the jury’s finding:

We have held that a train operator may be found negligent if he or she sees a person on the tracks “from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care, to stop before striking the person.” The train operator’s duty certainly is not vitiated because plaintiff was voluntarily walking or running along the tracks or because of any reckless conduct on plaintiff’s part.

Thus, it was not irrational for the jury to find NYCTA negligent. There is a reasonable view of the evidence that the train operator failed to see the teenagers from a distance from which he should have seen them, and that he failed to employ emergency braking measures. The jury’s determination that the operator could have avoided this accident is an affirmed finding of fact with support in the record and is beyond our further review. Plaintiff’s conduct did not constitute such an unforeseeable or superseding event as to break the causal connection between his injury and defendant’s negligence.¹⁹⁴

The Court of Appeals cited two of its prior decisions, *Coleman v. New York City Transit Authority* and *Noseworthy v. City of New York*, where the liability of train operators was affirmed.¹⁹⁵ Readers will no doubt recognize *Noseworthy* as the Court of Appeals decision establishing a reduced burden of proof in certain wrongful death actions.¹⁹⁶

The *Soto* Court also affirmed the expert’s use of the plaintiff’s own estimate of his running speed:

Additionally, the jury was entitled to credit the testimony of plaintiff’s expert who used the estimated running speed in making his calculations. The expert did not express an opinion as to how fast plaintiff was running, but used plaintiff’s own estimate to determine

193. *Id.*

194. *Id.* at 493, 846 N.E.2d at 1215, 813 N.Y.S.2d at 705 (citations omitted).

195. *Id.* (citing *Coleman v. New York City Transit Auth.*, 37 N.Y.2d 137, 140-45, 332 N.E.2d 850, 851-55, 371 N.Y.S.2d 663, 665-70 (1975); *Noseworthy v. City of New York*, 298 N.Y. 76, 78-81, 80 N.E.2d 744, 744-46 (1948)).

196. *Noseworthy*, 298 N.Y. at 80, 80 N.E.2d at 746.

where the train could have come to rest if plaintiff was running at the speeds he asserted. As a result, it was not “pure speculation and conjecture,” but admissible and reliable evidence from which the jury properly concluded that the train could have stopped before striking plaintiff.¹⁹⁷

In *Dibble v. New York City Transit Authority*, the plaintiff was injured when he was struck by a train while on the track bed at the Union Square station.¹⁹⁸ Two experts testified for the plaintiff, the first, an engineer, and the second, a retired train operator.¹⁹⁹ The engineer testified, inter alia, regarding average reaction times for train operators.²⁰⁰ The jury returned a verdict for plaintiff, which the trial court declined to set aside, and the First Department reversed:

The issue before this Court, therefore, is whether such a unit of time-distance measurement may be the sole basis for establishing what amounts to a standard of care in these types of cases. We find that a reaction time that is seconds or fractions of a second longer than the purported average cannot, as a matter of law, constitute the difference between reasonable and unreasonable conduct, or proof of negligence.²⁰¹

The train operator was deposed, but died before trial; his deposition transcript was read into evidence and was the only meaningful fact testimony discussed in the opinion.²⁰² Relevant portions of his testimony are as follows:

[O]n the night in question, as he was coming into the Union Square station, he saw a dark object at the beginning of the station. He stated, “It looked like garbage . . . Maybe some material left by some of the track workers.” It was dark in color and just looked like a “mass” or a “lump”. The object was to the left of the rails, almost under the platform, about a foot and a half above the road bed. He testified that he was about three car lengths away at that point, and that he slowed up. He did not stop the train, and did not want to slow up too much. Then, when he was one car length away, he “saw the debris move,” and he put the train into emergency.

. . . .

197. *Soto*, 6 N.Y.3d at 494, 846 N.E.2d at 1215-16, 813 N.Y.S.2d at 705-06.

198. 76 A.D.3d 272, 273, 903 N.Y.S.2d 376, 377 (1st Dep’t 2010).

199. *Id.* at 275, 903 N.Y.S.2d at 378.

200. *Id.*

201. *Id.* at 273, 903 N.Y.S.2d at 377.

202. *Id.* at 273, 277-78, 903 N.Y.S.2d at 377, 379-80. The only other testimony by a fact witness referenced by the First Department was testimony by the conductor “that the train might have been traveling at twenty-five miles per hour.” *Dibble*, 76 A.D.3d at 277, 903 N.Y.S.2d at 380.

When asked if there was a reason he did not stop the train when he first saw the debris, he responded that, if he stopped whenever he saw debris on the tracks, he would have to stop the train every five minutes. He estimated that the time that elapsed between when he first saw the “mass” and when he stopped the train was about four seconds. He was not sure how far the train traveled after he stopped it. He could not tell if he had run over the object, but knew that he had stopped at a point past where he had first seen the debris.

After the train stopped, Moore called the control center to have the power turned off. He saw the plaintiff lying partially on the left running rail between the first and second cars. When asked if plaintiff was in the same location as he had been in before the train hit him, Moore responded that he definitely was not, that he was about a car length further into the station than when Moore had first observed the object he described variously as a mass, a lump or debris.²⁰³

Plaintiff’s engineering expert utilized a one second average reaction time for the train operator in calculating stopping distances, which were based upon the train operator first seeing an object on the tracks when the train was three car lengths away.²⁰⁴ Acknowledging that the train operator mistakenly testified that the length of each car was seventy-five feet when, in fact, each car was sixty feet in length, the expert proceeded to provide calculations based on the shorter car length.²⁰⁵ Utilizing these parameters, the expert calculated that regardless of whether the train was traveling at twenty or twenty-four miles per hour, the operator could have stopped the train without striking the plaintiff.²⁰⁶

The expert conceded that the train operator did not comprehend that there was a person on the tracks until the train was one car length away, and further conceded that at that distance, the train operator could not have stopped the train without hitting the plaintiff.²⁰⁷ The expert “acknowledged that he had never [operated] a train, and that [he] relied heavily on measurements that were only estimates.”²⁰⁸

Plaintiff’s engineering expert then opined that at the lower speed of twenty miles per hour, the operator could have stopped the train without striking the plaintiff even if the operator’s reaction time was four seconds; he further opined that at the higher speed of twenty-four miles

203. *Id.* at 273-74, 903 N.Y.S.2d at 377-78.

204. *Id.* at 275, 903 N.Y.S.2d at 378.

205. *Id.* at 277-79, 903 N.Y.S.2d at 380-81.

206. *Id.* at 278-79, 903 N.Y.S.2d at 380-81.

207. *Dibble*, 76 A.D.3d at 275, 903 N.Y.S.2d at 378.

208. *Id.*

per hour, the operator could have stopped the train without striking the plaintiff even if the operator's reaction time was two seconds.²⁰⁹

The defendant called two experts, an engineer and a train operator instructor.²¹⁰ Defendant's engineer disagreed with plaintiff's average one-second reaction time for a train operator:

[Defendant's expert engineer] explained that reaction time involved three phases during which 1) an object is perceived and identified, 2) an analysis is conducted as to what should be done about it, and 3) the decision is acted upon. He opined that, in this case, [the train operator's] analysis could have been slowed by the fact that the plaintiff was wearing dark clothing on a dark subway roadbed. [Defendant's expert engineer] also testified that reaction time not only varies from individual to individual but that it can vary for any one individual at different times.²¹¹

The First Department acknowledged that:

The Court of Appeals has held that "a train operator may be found negligent if he or she sees a person on the tracks 'from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care, to stop before striking the person.'"²¹²

The court also noted that, "[i]f there is a question of fact and 'it would not be utterly irrational for a jury to reach the result it has determined upon . . . the court may not conclude that the verdict is as a matter of law not supported by the evidence.'"²¹³ The First Department identified the question of fact as "whether [the train operator] could have avoided hitting the plaintiff."²¹⁴

The First Department concluded that "the jury's determination that the accident could have been avoided was based on nothing more than a series of estimated stopping distances that incorporated purported average reaction time."²¹⁵ Agreeing with the defendant's argument "that the plaintiff's case was based entirely on impermissible speculation," the First Department held "that the [jury] verdict was thus based on insufficient evidence, as a matter of law."²¹⁶

[N]one of the variables utilized by the plaintiff's expert to calculate possible stopping distances were established conclusively at trial. All

209. *Id.* at 278-79, 903 N.Y.S.2d at 380-81.

210. *Id.* at 276, 903 N.Y.S.2d at 379.

211. *Id.*

212. *Dibble*, 76 A.D.3d at 277, 903 N.Y.S.2d at 379 (citations omitted).

213. *Id.* at 276, 903 N.Y.S.2d at 379 (citation omitted).

214. *Id.* at 277, 903 N.Y.S.2d at 379.

215. *Id.*

216. *Id.*, 903 N.Y.S.2d at 380.

were estimates or approximations. It was [the train operator] at his deposition who estimated his speed to be between 20-24 mph as he approached the station. His conductor stated that the train might have been traveling at 25 mph. Further, it was solely [his] estimate that he was *about* three car lengths away when he first saw debris to the left, almost under the platform at the beginning of the station. [He] further stated that the cars were 75 feet in length; in fact, as [plaintiff's expert engineer] subsequently acknowledged, the cars on the subject train were just 60 feet long. [The train operator] was the sole witness as to what exactly was visible as the train approached the station; he was also the sole witness as to how far away he was when he saw what he described as the debris moving. The one undisputed fact is that [plaintiff] was found with his severed foot beside him 40 feet into the station, that is, 40 feet from the location, the beginning of the station, where [the train operator] testified he first saw the debris. There was no evidence presented to indicate that the plaintiff was struck at the beginning of the station and then dragged for 40 feet. Indeed that scenario was roundly rejected. There was no blood evidence except in the location where [plaintiff] was found, and he had no injuries consistent with being dragged or pushed by the train from the beginning of the station. This strongly suggests that the debris that [the train operator] first saw was not, in fact, the plaintiff whom he struck 40 feet further along.²¹⁷

After reviewing plaintiff's engineering expert's scenarios and resulting calculations, all of which indicated that the operator would have been able to stop the train without hitting the plaintiff, the First Department proceeded to analyze scenarios plaintiff's engineering expert was not asked to apply, and upon which he was not, according to the decision, cross-examined by the defendant.²¹⁸

[Plaintiff's engineering expert], however, was not asked to apply, and did not apply, a four second reaction time to his original scenario where the train was traveling at 24 mph. In such scenario, [the train operator] would have traveled approximately 141 feet (4 x 35.2) before he applied the brake, and a further 167 feet braking distance for a total stopping distance of approximately 308 feet, whereupon he would have unavoidably hit the plaintiff.

Such a scenario, of course, makes perfectly clear that [the train operator's] failure to exercise reasonable care could be established only by arbitrarily imposing upon [him] the purported average reaction time of one second. In other words, in determining that the defendant's train operator failed to exercise reasonable care because

217. *Dibble*, 76 A.D.3d at 277-78, 903 N.Y.S.2d at 380.

218. *Id.* at 278-79, 903 N.Y.S.2d at 380-81.

he could have stopped, the jury improperly equated negligence with possession of a motor skill that is essentially a reflex action. Moreover, in this case, the motor skill that determines the reaction time in any individual, and which is measured in seconds and fractions of a second, was assumed to be the purported average of just one second with no variability for identification, analysis and decision.²¹⁹

You might be wondering where a four second reaction time came from, since plaintiff's engineering expert's calculations and testimony was based upon a one second reaction time. In fact, the four second reaction time came from plaintiff's expert:

[Plaintiff's engineering expert] then applied the formula to a speed of 20 mph and found that one second of reaction time would add 29.3 feet to the braking distance of 121 feet for a total stopping distance of 150.3 feet. Hence, Bellizzi testified, with 265 feet available, Moore would have stopped with 112 (*sic*) feet to spare. Moreover, Bellizzi opined that at this speed, the train operator could have stopped before hitting the plaintiff even if he had needed four seconds of reaction time (4 x 29.3). On the other hand, with 220 feet available, Bellizzi opined that Moore could have taken two seconds in reaction time and still stopped before striking the plaintiff.²²⁰

The decision does not explain whether this testimony was elicited by counsel for one of the parties or volunteered by the expert. However, it was the testimony that provided the foundation for the First Department's conclusion that an alternate scenario, never elicited during trial, existed, which would have resulted in the plaintiff being struck by the train without proof of the train operator's negligence:

In our view, the court simply did not go far enough. As the defendants in this case assert, the use of an average reaction time of one second implicitly renders negligent any train operator with a longer than average reaction time.

More egregiously, the record does not reflect that the plaintiff's expert provided any foundation or evidentiary support for his observation that the average reaction time of a train operator is one second. Much less was it established as the average reaction time for non-negligent train operators.

[Plaintiff's engineering expert] acknowledged that, in this case as in the cases of hundreds of other plaintiffs for whom he has testified, he uses one second for a train operator's reaction time even though he has never seen or conducted a study of reaction times of train operators. Indeed, when asked on direct how he arrived at the one second

219. *Id.* at 279, 903 N.Y.S.2d at 381.

220. *Id.* at 278-79, 903 N.Y.S.2d at 381.

reaction time, [he] replied:

“Well, there are many, many, many studies for automobile drivers. I myself have never seen a reaction time study for a train operator, I know of none . . . [But reaction times for automobile drivers] [t]hey’ve pretty much all come to the conclusion it’s about a second for an auto driver under normal circumstances.”

The paucity of research on train operator reaction times notwithstanding, on cross-examination, [plaintiff’s engineering expert] testified to *choosing* one second because “that’s a reasonable average reaction time” of train operators. He defended the choice by stating that this was not a “complex situation,” that there was only one reaction required, that is throwing the brake, and that “there [was] no reason to think that [the train operator] had a reaction time slower than average.”²²¹

Where was the testimony in the record establishing that a four second reaction time could be considered “the exercise of reasonable care”? There was none. One can infer that plaintiff’s expert, after giving his expert opinion utilizing the one second reaction time, attempted to convey the magnitude of the train operator’s negligence by explaining that with a four second reaction time the train could have been safely brought to a stop without striking the plaintiff. If this is what happened, and with the benefit of 20/20 hindsight, a poor strategy, but not a concession that a four second reaction time was reasonable.

The First Department then turned to the issue of the train operator’s individual reaction time:

Even were we to accept *arguendo* that an average reaction time for a train operator is indeed one second, the necessary corollary to [plaintiff’s engineering expert’s] speculation is that there is no reason to assume that [the train operator’s] reaction time was the purported average. On the contrary, it is self-evident that if the average reaction time is deemed to be one second for train operators, then a number of all train operators will have a reaction time of less than one second, and correspondingly a number of all train operators a reaction time of more than one second. Moreover, as [defendant’s engineer] testified, those in the 85th percentile will have a reaction time of two and a quarter seconds.

Nothing in the record indicates where [the train operator] might be found along that spectrum. But if, for example, [he] had been in the 85th percentile, two and a quarter seconds of reaction time and car lengths of 60 feet would have resulted in the plaintiff being struck

221. *Id.* at 279-80, 903 N.Y.S.2d at 381-82.

2011]

Evidence

797

even if [he] had put the train into emergency when he first saw the debris. Further, as [defendant's engineering expert] testified, and [plaintiff's engineering expert] conceded, reaction time also may be affected on any particular occasion by factors such as age and vision and other variables such as lighting or weather or time of day.

It is troubling that, aside from one suggestion made by [defendant's engineering expert] that the plaintiff's dark clothing could have hampered [the train operator's] analysis of the situation and thus increased his reaction time, no other attempt was made to apply any of the above mentioned factors or ranges to the train operator in this case. Had the effort been made, it would have become apparent to the jury that there was insufficient evidence to determine whether [the train operator] could have stopped without striking the plaintiff.²²²

None of this analysis was part of the record at trial because defense counsel did not inquire, and there is nothing in the decision that the defendant considered an operator in the 85th percentile to be qualified to operate a train.

Based upon its analysis of plaintiff's engineering expert's testimony, the First Department failed to credit the train operator's testimony that he had sufficient time to stop the train from the time he first saw an object on the tracks:

For the foregoing reasons, we also reject the plaintiff's contention that [plaintiff's engineering expert] merely provided scientific corroboration for [the train operator's] concession that he could have stopped the train before hitting the plaintiff had he put the train into emergency when he first saw the debris. [The train operator's] own speculation, in any event, was not an acknowledgment of negligence since it was made in the context of testimony as to the train operator's belief that what he first saw was debris and not a person.²²³

After *Dibble*, in order to pass muster with the First Department, plaintiffs in a case involving a train operator's ability to stop a train would appear to have to proffer evidence of, inter alia:

1. Results of studies of average reaction times specifically for train operators;
2. Reaction time studies utilized and relied upon by the entity in selecting operators to operate its trains;
3. Hiring and retention criteria for train operators utilized by the entity operating the train (including reaction time evaluations); and

222. *Dibble*, 76 A.D.3d at 280-81, 903 N.Y.S.2d at 382.

223. *Id.* at 281, 903 N.Y.S.2d at 382.

4. Hiring and retention testing and evaluation of the train operator involved in the accident.

Since a major criticism of plaintiff's proof was the failure to establish that the operator in question had an average reaction time, and since the court would presumably find the operator's own testimony about his or her reaction time speculative, just as it did the operator's testimony that he could have brought the train safely to a stop, disclosure may be required of, *inter alia*:

1. Initial and subsequent medical evaluations of the train operator by the employer; and
2. Medical records of the train operator.

Imagine the reaction to these disclosure requests! Furthermore, it may be necessary to add claims for negligent hiring and/or retention in order to obtain some of these records, as well as the benchmarks against which the individual operator's reaction time is measured. At depositions, questions regarding periodic re-testing and/or re-qualifying, and regarding what independent testing or industry standards the employer relied upon, may need to be asked.

What type of proof will suffice, going forward, concerning speed? The train operator's own estimate of his speed was critiqued by the First Department as being one of the "estimates or approximations," none of which "were established conclusively at trial."²²⁴ What better proof could there be of the train's speed? How do you establish speed "conclusively" at trial?

Of course, the rejection by the First Department of an average reaction time for the operator of a train and the critique of the adequacy of the proof of certain variables at trial has application in many other types of cases where average reaction times are commonly used. It would, by parity of reasoning, extend to a case involving an automobile striking a pedestrian in a cross-walk.

Finally, the type of foundation that the First Department suggests is needed for an expert to testify concerning a person's average reaction time has elements of the type required by *Daubert*, rather than the generally more lenient requirement set forth in *Frye*.

As of this writing, the Court of Appeals has granted leave.²²⁵

²²⁴ *Id.* at 277, 903 N.Y.S.2d at 380.

²²⁵ *Dibble v. N.Y. City Transit Auth.*, No. 2011-48, 2011 NY Slip Op. 67676(U) (N.Y. 2011).

2011]

Evidence

799

CONCLUSION

It seems that the practice of law increases in complexity with each passing year. The myriad rules of practice, coupled with an avalanche of judicial opinions, makes staying current with the law an aspiration rather than an attainable goal. It is my sincere hope that this *Survey* lightens the load.