EVIDENCE

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CONTENTS

INTRODUCTION 746
I. ALL THINGS EXPERT 746
A. *Admissibility of Expert Testimony on the Issue of Reliability of a Confession* 746
B. *Scope of Expert Testimony* 751
C. *Attacking the Credibility of an Expert by Challenging Religious Beliefs* 753
D. *Payment to Experts for Testifying as Fact Witnesses* 754
E. *The Usefulness or Necessity of Expert Testimony* 756
F. *Expert Qualifications* 760
G. *Expert Opinion Evidence on Summary Judgment Motions* 761
1. *The Second Department Clarifies: An Expert Need Not Be Disclosed Prior to Filing the Note of Issue in Order to Be Considered on a Motion for Summary Judgment.* 761
2. *Foundation for an Expert's Opinions* 762
II. EVIDENCE OF UNCHARGED CRIMES AND PRIOR BAD ACTS 767
III. JUDICIAL NOTICE 773
IV. PRESUMPTIONS AND OTHER EVIDENTIARY SHORTCUTS 774
A. *Res Ipsa Loquitur* 774
B. *Statutory Presumptions* 778
C. *Non-Statutory Presumptions* 781
D. Noseworthy v. City of New York 782
V. EXCEPTIONS TO THE HEARSAY RULE 785
A. *The Court of Appeals Addresses Statements Made to Medical Personnel* 785
B. *Excited Utterance—Present Sense Impression* 798

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C. *Non-Verbal Hearsay* 802
VI. CIRCUMSTANTIAL PROOF 802
A. *Evidence of Habit* 802
CONCLUSION 803

INTRODUCTION

This *Survey* will cover some of the more significant New York State court decisions on evidentiary issues over the past year and a half.[1] For example, there were a number of notable decisions in the area of expert witnesses, both in the context of trial testimony and summary judgment motions. The use of experts has become routine in civil cases, and increasingly so in criminal cases. We shall begin the discussion with recent developments in the law on expert witnesses.

I. ALL THINGS EXPERT

A. *Admissibility of Expert Testimony on the Issue of Reliability of a Confession*

Although certainly nothing new in the area of criminal trial practice, creative defense strategy has evolved to include the use of experts to explain and validate uncharacteristic human behavior. One of the current trends is the use of experts to explain why an innocent person would falsely confess to a crime. This follows on the heels of, and is often analogized to, the use of experts to explain the phenomenon of faulty eye-witness identification.[2] The admissibility of such testimony has been held to rest within the sound discretion of the trial judge based upon the facts and circumstances of each case.[3]

In *People v. Bedessie*, decided last year, the Court of Appeals addressed the parameters for admissibility of expert testimony to explain an alleged false confession by an otherwise innocent person.[4] The defendant in *Bedessie* was convicted of multiple charges involving sexual abuse of a four-year-old boy, who had been left in her care as a teacher's assistant.[5] Her arrest and ultimately her conviction were based largely on an oral confession made to a detective with the Queens Child

1. The Survey year covered in this Article is from July 1, 2011 to June 30, 2012.
2. People v. Lee, 96 N.Y.2d 157, 162, 750 N.E.2d 63, 66, 726 N.Y.S.2d 361, 364 (2001); People v. LeGrand, 8 N.Y.3d 449, 457-458, 867 N.E.2d 374, 379, 835 N.Y.S.2d 523, 528 (2007); People v. Abney, 13 N.Y.3d 251, 267-68, 918 N.E.2d 486, 495, 889 N.Y.S.2d 890, 899 (2009).
3. *Lee*, 96 N.Y.2d at 162, 750 N.E.2d at 66, 726 N.Y.S.2d at 364.
4. 19 N.Y.3d 147, 156, 970 N.E.2d 380, 385, 947 N.Y.S.2d 357, 362 (2012).
5. *Id.* at 149-50, 155, 970 N.E.2d at 381, 385, 947 N.Y.S.2d at 358, 362.

Abuse Squad, who had been called in to investigate a complaint made by the child's mother.[6] The child had reportedly told his mother that the defendant, his teacher, had touched him, manipulated his penis, and had made sexual contact with her own private parts.[7]

Within a month, the detective took the defendant into custody at the Queens Child Advocacy Center to question her.[8] She was read her *Miranda* rights and informed of the allegations against her.[9] She was also asked to give her version of the events.[10] She then explained that the boy was "very different" than the other boys, would "touch her breasts," and that on two occasions, while in the bathroom, she fondled the boy while fondling herself.[11] The interview was over an hour long and was completed within two hours of her arrival at the Queens Child Advocacy Center.[12] She then agreed to have her statement videotaped, which was completed about an hour later.[13]

A day prior to trial, defense counsel made an application to call an expert in the field of false confessions.[14] In support of his application, the defendant's attorney argued that the issue was analogous to that addressed by the court in *People v. LeGrand*, regarding expert testimony on eyewitness identification.[15] The trial court denied the application.[16] The court noted that unlike in the false identification cases cited by defense counsel, in this case, there could have been corroboration of the alleged false confession through the testimony of the child at trial.[17] This fact was critical to the result in the Court of Appeals.[18]

The child complainant did testify at trial, along with his mother, the nurse who examined him at the emergency room, and the doctor who examined him at a child advocacy center.[19] In addition, the prosecution called the investigating detective who testified about his interview of the defendant, and through whom the jury was shown the

6. *Id.* at 152, 970 N.E.2d at 382, 947 N.Y.S.2d at 359.
7. *Id.* at 150, 970 N.E.2d at 381, 947 N.Y.S.2d at 358.
8. *Id.* at 151, 970 N.E.2d at 382, 947 N.Y.S.2d at 359.
9. *Bedessie*, 19 N.Y.3d at 151, 970 N.Y.2d at 382, 947 N.Y.S.2d at 359.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 152, 970 N.E.2d at 382, 947 N.Y.S.2d at 359.
14. *Bedessie*, 19 N.Y.3d at 152, 970 N.E.2d at 383, 947 N.Y.S.2d at 360.
15. *Id.*
16. *Id.* at 153, 970 N.E.2d at 383, 947 N.Y.S.2d at 360.
17. *Id.*
18. *Id.* at 157, 970 N.E.2d at 386, 947 N.Y.S.2d at 363.
19. *Bedessie*, 19 N.Y.3d at 153, 970 N.E.2d at 383, 947 N.Y.S.2d at 360.

defendant's videotaped confession.[20]

The defendant testified on her own behalf at trial and called two character witnesses, as well as a forensic psychologist who testified about the proper technique for interviewing and investigating young children involved with sexual abuse allegations.[21] The defendant denied having sexual relations with the victim.[22] She denied that anything she said during her videotaped confession was true, claiming that she made the statements only because the detective gave his word that he would let her go home to her sick mother if she did.[23]

The defendant appealed her conviction.[24] The Appellate Division, Second Department unanimously affirmed, rejecting all of the defendant's claims of error, including the claim that the trial court's decision to preclude expert testimony on the issue of false confessions was an error.[25]

The Court of Appeals began its decision by recognizing the validity of the concept of a false confession.[26] The Court then engaged in legal analysis with reference to its 2001 decision in *People v. Lee*.[27] In that case, the Court laid out the principles guiding the trial court's evaluation of whether, in a given case, expert testimony on the issue of the reliability of eyewitness testimony should be permitted.[28] The first principle was that admissibility rests within the discretion of the trial court.[29] The Court further instructed that the trial court should be guided by whether the expert's testimony would "aid a lay jury" in its deliberations.[30] Such testimony should not be excluded because, to a degree, it invades the jury's province.[31] Furthermore, although some jurors may have general familiarity with the reliability issues associated with eyewitness testimony, the psychological studies bearing on reliability are not necessarily within the experience of the average juror.[32] The Court noted that in such circumstances, expert testimony may require a *Frye* hearing to determine whether the proffered expert

20. *Id.*
21. *Id.* at 154, 970 N.E.2d at 384, 947 N.Y.S.2d at 361.
22. *Id.*
23. *Id.* at 155, 970 N.E.2d at 385, 947 N.Y.S.2d at 362.
24. *Bedessie*, 19 N.Y.3d at 156, 970 N.E.2d at 385, 947 N.Y.S.2d at 362..
25. *Id.* at 155-56, 970 N.E.2d at 385, 947 N.Y.S.2d at 362.
26. *Id.* at 156, 970 N.E.2d at 385, 947 N.Y.S.2d at 362.
27. *Id.*
28. *Id.*
29. *Bedessie*, 19 N.Y.3d at 156, 970 N.E.2d at 385, 947 N.Y.S.2d at 362.
30. *Id.*
31. *Id.*
32. *Id.*, 970 N.E.2d at 385-86, 947 N.Y.S.2d at 362-63.

testimony is generally accepted by the relevant scientific community.[33]

Applying these principles to the facts and issues in *Bedessie*, the Court noted that the child victim's testimony corroborated the defendant's alleged false confession, the defendant's confession supplied many details previously unknown to the detective investigating the matter, and the expert's report primarily addressed issues not relevant to the facts of the case.[34] Specifically, the expert's focus was on the interrogation method used to question the child victim, rather than on the interrogation methods used to question the defendant.[35] The Court noted that such testimony was not relevant to the issue of whether the defendant's confession was false, forced, or otherwise unreliable.[36]

The balance of the expert's proffered testimony addressed the detective's failure to videotape his interview of the defendant prior to the videotaping, a period of slightly more than one hour.[37] The expert's report discussed the possibility that pre-confession videotaping would have identified "contamination," where the police intentionally or unintentionally fed salient facts to the suspect during the interrogation, and thereafter those facts became details in the videotaped confession.[38] However, the Court determined that contamination was never relevant in this case because the detective's knowledge of the alleged sexual abuse was quite limited until the defendant offered her detailed confession.[39]

There are two significant subtexts to be gleaned from the Court's analysis in *Bedessie*. First, the Court openly acknowledged the validity of research in the area of false confessions regarding certain personality types that are more likely to be forced into giving false confessions.[40] In *Bedessie*, the proffered expert testimony was not going to address either of the personality traits of the defendant.[41] Second, the Court recognized the validity of false confessions research that identifies conditions or characteristics of interrogation that can induce an individual to falsely confess to a crime.[42] Thus, in the appropriate case, expert testimony regarding false confessions may be admissible to

33. *Id.* at 156-57, 970 N.E.2d at 385-86, 947 N.Y.S.2d at 362-63.
34. *Bedessie*, 19 N.Y.3d at 157-58, 970 N.E.2d at 386, 947 N.Y.S.2d at 363.
35. *Id.* at 157, 970 N.E.2d at 386, 947 N.Y.S.2d at 363.
36. *Id.* at 158, 970 N.E.2d at 386-87, 947 N.Y.S.2d at 363-64.
37. *Id.* at 158, 970 N.E.2d at 387, 947 N.Y.S.2d at 364.
38. *Id.*
39. *Bedessie*, 19 N.Y.3d at 158, 970 N.E.2d at 387, 947 N.Y.S.2d at 364.
40. *Id.* at 159, 970 N.E.2d at 387, 947 N.Y.S.2d at 364.
41. *Id.*
42. *Id.* at 159, 970 N.E.2d at 388, 947 N.Y.S.2d at 365.

explain that the interrogation techniques used were more likely to result in a false confession.

In *Bedessie*, the expert planned to testify that the detective, in his questioning of the defendant, improperly suggested a "treatment alternative" to imprisonment if she confessed.[43] The Court rejected this proposed testimony, noting that the "treatment alternative strategy" was not supported by any published studies recognizing that the theory was generally accepted within the scientific community as a conducive factor to determining whether there was a false confession.[44] Moreover, at trial, the defendant did not even testify that she was offered treatment if she confessed.[45] She claimed instead that the detective assured her that there would be no repercussions if she confessed.[46]

Through its analysis, the Court determined that *Bedessie* did not present facts that fit within the established and recognized research regarding personality types prone to false confessions or the interrogation techniques associated with false confessions.[47] Accordingly, the majority concluded that the trial court properly exercised its discretion in excluding the proffered expert testimony.[48]

Notwithstanding this result, the Court sent a direct message regarding the use of expert testimony on false confessions in the appropriate case:

> [f]alse confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system. And there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions.[49]

Regarding the scope of any such testimony, the Court cautioned that an expert "may not testify as to whether a particular defendant's confession was or was not reliable," and further, that "the expert's proffer must be relevant to the defendant and interrogation before the court."[50]

There was also a thoughtful dissent by Judge Jones in this case.[51]

43. *Id.* at 160, 970 N.E.2d at 388, 947 N.Y.S.2d at 365.
44. *Bedessie*, 19 N.Y.3d at 160-61, 970 N.E.2d at 388, 947 N.Y.S.2d at 365.
45. *Id.* at 160, 161, 970 N.E.2d at 388, 947 N.Y.S.2d at 365.
46. *Id.*
47. *Id.* at 159, 970 N.E.2d at 387, 947 N.Y.S.2d at 364.
48. *Id.* at 161, 970 N.E.2d at 389, 947 N.Y.S.2d at 366.
49. *Bedessie*, 19 N.Y.3d at 161, 970 N.E.2d at 388-89, 947 N.Y.S.2d at 365-66.
50. *Id.* at 161, 970 N.E.2d at 389, 947 N.Y.S.2d at 366.
51. *Id.* (Jones, J., dissenting).

He offered his view that expert opinion evidence regarding false confessions should be allowed in cases like *Bedessie*, where there was "little to no corroborating evidence connecting defendant to the commission of the crimes charged."[52] He noted that the defendant's conviction in *Bedessie* rested largely upon her confession, which was contested, and the unsworn testimony of a young child.[53]

B. Scope of Expert Testimony

In *People v. Rivers*, a decision authored by Judge Jones a few months earlier, the Court addressed the appropriate scope of expert testimony in an arson prosecution.[54] One of the legal issues on appeal was whether a prosecutor's expert in an arson case could offer his or her opinion that the fire had been intentionally set.[55] Such testimony was inadmissible under the long-established precedent set by the court in *People v. Grutz*, a case which held that expert testimony as to the cause of a fire is not necessary and constitutes an invasion of the jury's province.[56]

Overruling *Grutz*, the Court held that an expert could testify, in an arson case, to the ultimate question of whether a fire was intentionally set where such testimony would aid the jury and the cause of the fire is a legitimate issue in the case.[57] The Court noted that *Grutz* was decided in 1914, an era when fire investigations "involved far less technical expertise than they do today."[58] The Court reiterated that the threshold determination for the admission of expert testimony is whether "it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror."[59]

The Court noted in *Rivers* that expert testimony was "largely unnecessary" because of the overwhelming evidence, independent of the expert's opinions, demonstrating that the fires had been intentionally set.[60] Thus, the error in admitting the expert testimony was harmless in

52. *Id.*

53. *Id.*

54. 18 N.Y.3d 222, 227, 960 N.E.2d 419, 422, 936 N.Y.S.2d 650, 653 (2011).

55. *Id.* at 225, 227, 960 N.E.2d at 421, 422, 936 N.Y.S.2d at 652, 653.

56. 212 N.Y. 72, 82, 105 N.E. 843, 847 (1914), *overruled by Rivers*, 18 N.Y.3d at 228, 960 N.E.2d at 423, 936 N.Y.S.2d at 654.

57. *See Rivers*, 18 N.Y.3d at 228, 960 N.E.2d at 423, 936 N.Y.S.2d at 654.

58. *Id.* at 227, 960 N.E.2d at 422, 936 N.Y.S.2d at 653.

59. *Id.* at 228, 960 N.E.2d at 423, 936 N.Y.S.2d at 654 (citing De Long v. Cnty. of Erie, 60 N.Y.2d 296, 307, 457 N.E.2d 717, 722, 469 N.Y.S.2d 611, 617 (1983)).

60. *Rivers*, 18 N.Y.3d at 228, 960 N.E.2d at 423, 936 N.Y.S.2d at 654.

light of the overwhelming evidence of guilt, and lack of "significant probability that the jury would have acquitted defendant without the expert testimony."[61]

In the same vein as *Rivers*, the Court in *People v. Clyde* addressed whether expert medical testimony that helps establish elements of a crime improperly invades the province of the jury.[62] The defendant, convicted of assault and unlawful imprisonment, argued on appeal that it was error to permit physicians to offer testimony that specifically satisfied elements of the crimes charged.[63] The victim was a female employee at a correctional facility who had reported an assault and attempted rape.[64]

At trial, one of the emergency department physicians who treated the victim was permitted to opine about whether the victim's injuries constituted "substantial pain or limitation of physical condition," and thereby met the definition of "physical injury," as was required to satisfy the elements of the assault charge.[65] Another physician was permitted to testify about whether the attack created a "risk of serious physical injury," defined as physical injury that "creates a substantial risk of death," as required to satisfy the elements of the false imprisonment charge.[66] Representing himself, the defendant objected to this testimony at trial, arguing that such testimony invaded the province of the jury.[67]

The Court of Appeals criticized the admission of the medical expert's testimony, finding that "[t]he facts that underlie physical injury and risk of serious physical injury can readily be stated to a jury so as to enable the jurors to form an accurate judgment concerning the elements of assault and unlawful imprisonment."[68] Therefore, the trial court erred in allowing the expert testimony to be admitted.[69] However, as was the case in *Rivers*, the Court held that the admission of such testimony was harmless error in light of the overwhelming evidence of guilt.[70]

One can glean from *People v. Clyde* that where the connection

61. *Id.*
62. 18 N.Y.3d 145, 154, 961 N.E.2d 634, 639-40, 938 N.Y.S.2d 243, 248-49 (2011).
63. *Id.* at 155, 961 N.E.2d at 640, 938 N.Y.S.2d at 249.
64. *Id.* at 150, 154, 961 N.E.2d at 637, 640, 938 N.Y.S.2d at 246, 249.
65. *Id.* at 151, 961 N.E.2d at 637-38, 938 N.Y.S.2d at 246-47.
66. *Id.* at 151, 961 N.E.2d at 637-38, 938 N.Y.S.2d at 246-47.
67. *Clyde*, 18 N.Y.3d at 154, 961 N.E.2d at 639-40, 938 N.Y.S.2d at 248-49.
68. *Id.*, 961 N.E.2d at 640, 938 N.Y.S.2d at 249.
69. *Id.*
70. *Id.* at 154-55, 961 N.E.2d at 640, 938 N.Y.S.2d at 249.

between the description of physical injuries and the definitions of physical injury and risk of serious physical injury is clear, uncontroverted, and obvious, expert testimony is not proper. The subtext is that should expert testimony be offered under circumstances where the connection is obvious, such an admission may be found to be harmless error.

C. Attacking the Credibility of an Expert by Challenging Religious Beliefs

The Court of Appeals addressed the scope of permissible cross-examination of an expert about his religious practices in *State v. Andrew O.*, a proceeding pursuant to Article 10 of the Mental Hygiene Law to determine whether the respondent was a dangerous sex offender requiring confinement to a secure facility.[71] At a jury trial, the defendant's expert, and only witness, testified that the defendant did not suffer from a mental abnormality within the meaning of the Mental Hygiene Law.[72]

The State's attorney, on cross-examination, attacked the expert's credibility on the basis of his religious beliefs.[73] He questioned the expert psychologist about his religion of Yoism, of which the expert was a co-founder.[74] The expert was questioned on the religion's basic tenets and whether it was based upon historical text.[75] The State's attorney reiterated his attack on the credibility of the expert through a collateral attack on the expert's religious beliefs, arguing, among other things, that jurors would "want to know if the doctor had founded a religion [and] the saints of that religion were Bob Marley, and Timothy Leary, and Bob Dylan."[76] The Court of Appeals held that the trial court should not have allowed the prosecution to cross-examine the defendant's expert about his religious beliefs, holding that the attempt to attack the credibility of a witness because of his or her religious beliefs was improper "'because those factors are irrelevant to the issue of credibility.'"[77]

71. 16 N.Y.3d 841, 842, 947 N.E.2d 146, 147, 922 N.Y.S.2d 255, 256 (2011).
72. *Id.*
73. *Id.*
74. *Id.* at 842-43, 947 N.E.2d at 147-48, 922 N.Y.S.2d at 256-57.
75. *Id.* at 842, 947 N.E.2d at 147, 922 N.Y.S.2d at 256.
76. *Andrew O.*, 16 N.Y.3d at 842-43, 947 N.E.2d at 148, 922 N.Y.S.2d at 257.
77. *Id.* at 844, 947 N.E.2d at 149, 922 N.Y.S.2d at 258 (quoting People v. Wood, 66 N.Y.2d 374, 378, 488 N.E.2d 86, 88, 497 N.Y.S.2d 340, 342 (1985)).

D. Payment to Experts for Testifying as Fact Witnesses

In *Caldwell v. Cablevision Systems, Corp.*, the Second Department proposed a new jury instruction to address a plaintiff's contention that she deserved a new trial because of the excessiveness of a $10,000 fee paid by the defendant to an emergency room physician for his testimony regarding an entry in a hospital record.[78] The plaintiff was seeking damages for injuries she sustained in an alleged trip and fall accident, which she claimed was caused by the defendant cable company's failure to properly repair ground that it had disturbed in order to install a high speed fiber optic cable wire.[79] She testified at trial that she tripped and fell on uneven ground as she was walking her dog.[80]

To contradict the plaintiff's testimony, the defendant called, as a fact witness, the orthopedic surgeon who had examined the plaintiff in the emergency room for his testimony solely with respect to a description of the accident attributed to the plaintiff in a note by the surgeon in the hospital record.[81] The note itself was admitted into evidence as part of the hospital record, under the business records exception to the hearsay rule.[82] On direct examination, the surgeon admitted that he had no independent recollection of the entry.[83] However, he testified, in accordance with his note, that when he evaluated the plaintiff she told him that she had "tripped over a dog" while walking in the rain.[84] The surgeon acknowledged that he was appearing pursuant to a subpoena served upon him by defense counsel, and that defense counsel was compensating him for his lost time in the sum of $10,000.[85]

The trial court permitted plaintiff's counsel to cross-examine the surgeon regarding his payment.[86] Plaintiff's counsel moved to strike the testimony of the surgeon on the ground that it was improper as a matter of law for a defendant to pay $10,000 to a fact witness.[87] Alternatively, the plaintiff requested a jury instruction specifically pertaining to payment.[88] The court denied the plaintiff's motion, and instead gave the

78. 86 A.D.3d 46, 53, 56, 925 N.Y.S.2d 103, 108, 110 (2d Dep't 2011).
79. *Id.* at 48-49, 56, 925 N.Y.S.2d at 105, 111.
80. *Id.* at 49, 925 N.Y.S.2d at 105.
81. *Id.*
82. *Id.*
83. *Caldwell*, 86 A.D.3d at 49, 925 N.Y.S.2d at 105.
84. *Id.*
85. *Id.*
86. *Id.*
87. *See id.* at 49, 925 N.Y.S.2d at 105-06.
88. *Caldwell*, 86 A.D.3d at 49, 925 N.Y.S.2d at 106.

jury the general instruction regarding bias and credibility of a witness.[89]

The Second Department engaged in a fairly detailed examination of the propriety of such a large payment, which was well in excess of the statutory subpoena fee of fifteen dollars per day, and described it as "questionable from a public policy standpoint."[90] The court cited prior case law standing for the proposition that agreements to compensate witnesses in an amount in excess of statutory fees to offer fact testimony as opposed to opinions are unenforceable, tend to erode justice, and "portend to erode equal access to justice, create an incentive, even unconscious, toward biased testimony, and threaten the integrity of the judicial system by giving the appearance that justice is a commodity."[91] While public policy prohibits the enforcement of agreements to pay more than the statutory fees to fact witnesses for testimony, it is "generally accepted that such witnesses may properly be compensated for the loss of their time spent testifying."[92] Such arrangements are expressly permitted under the New York Rules of Professional Conduct and federal law.[93]

After engaging in further analysis, the court concluded that it was not necessary to determine whether the payment to the doctor was "reasonable" in order to resolve the appeal, because the appeal was not one that attempted to enforce the agreement between the physician and the defendant, nor was it an attorney disciplinary matter.[94] The precise issue was what effect the payment to the fact witness had on the underlying litigation in which the witness testified.[95]

The court determined that the trial court erred in failing to more specifically instruct the jury about paid witnesses, and fashioned a remedy involving a more specific jury instruction regarding payments made to fact witnesses.[96] The appropriate remedy would be to allow opposing counsel to fully explore the matter of compensation on cross-examination, and for the trial court to give the jury an appropriate instruction, containing

> general principles regarding fact-witness testimony . . . including a fact witness's public duty to testify for the statutory fee of $15; the permissibility of voluntary compensation for the reasonable value of

89. *See id.*
90. *Id.* at 50, 925 N.Y.S.2d 106.
91. *Id.* at 51, 925 N.Y.S.2d 106.
92. *Id.* at 51, 925 N.Y.S.2d 107.
93. *Caldwell*, 86 A.D.3d at 51-52, 925 N.Y.S.2d at 107.
94. *Id.* at 54, 925 N.Y.S.2d at 109.
95. *Id.*
96. *See id.* at 55, 925 N.Y.S.2d at 110.

> time spent in testifying; the goal of drawing the line between compensation that merely eases the burden of testifying and that which tends to unintentionally influence testimony; the inference, which may be drawn from the disproportionality of the payment to the reasonable value of lost time, that a fee for testimony has been paid; and the potential for unconscious bias that such a fee may create.[97]

The Second Department found that although the trial court erred in failing to give a specific instruction to the jury regarding payment of witnesses, this error did not require reversal.[98] Carefully discerning the substance of the testimony offered by the surgeon, the court observed that a limiting instruction, if given, would have gone to the issue of credibility.[99] In this case, the physician's credibility was not at issue because he admitted that he had no personal recollection of speaking with the plaintiff, and his testimony was based upon his written note in the hospital chart.[100] The plaintiffs were not challenging whether he made a note, but rather whether the note was accurate.[101] Putting a fine point on the analysis, the court noted that "[b]ecause the payment of fees to a fact witness goes merely to the credibility of the witness, in view of the nature of [the surgeon's] testimony, the charge error here was not so prejudicial as to warrant reversal and a new trial."[102]

In a footnote, the court observed that there may be occasions where the disproportionality of the payment to the reasonable value of the witness's lost time might be so obvious as to be "determinable as a matter of law" by the trial court.[103] In such cases, the trial court should instruct the jury accordingly, leaving to them the issue of what effect, if any, the payment had on a witness's credibility.[104]

E. The Usefulness or Necessity of Expert Testimony

As a general rule, the admissibility of expert testimony rests within the sound discretion of the trial judge.[105] The language used by courts in determining the admissibility of expert testimony may sometimes seem contradictory. In some cases, the word "necessary" is used,

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97. *Id.* at 55, 56, 925 N.Y.S.2d at 110 (internal citations omitted).
98. *Caldwell*, 86 A.D.3d at 56, 925 N.Y.S.2d at 111.
99. *Id.* at 56-57, 925 N.Y.S.2d at 111.
100. *Id.* at 56, 925 N.Y.S.2d at 111.
101. *Id.* at 57, 925 N.Y.S.2d at 111.
102. *Id.*
103. *Caldwell*, 86 A.D.3d at 55 n.1, 925 N.Y.S.2d at 110 n.1.
104. *Id.*
105. De Long v. Cnty. of Erie, 60 N.Y.2d 296, 307, 457 N.E.2d 717, 722, 469 N.Y.S.2d 611, 617 (1983).

implying a necessity test. Most often, a usefulness analysis suffices.[106] Often, the closer an expert's testimony gets to the actual elements of a crime or civil cause of action, the greater the scrutiny is as to whether it should be admitted.

An example of a case where the word "necessary" was used to support the court's exercise of discretion to admit expert testimony is found in *People v. Bryson*.[107] There, the First Department approved of the trial court's decision to admit expert testimony regarding gang related language.[108] The First Department found that "expert testimony was necessary to explain words and phrases that defendant used in phone conversations," and that such testimony was "highly probative" and "beyond the knowledge of the typical juror."[109]

In *People v. Clyde*, discussed above, the Court applied a necessity test to determine that it was error, albeit a harmless one, to permit physicians to testify as to whether the complainant's injuries fit within the statutory definitions of "physical injury" and "risk of physical injury," as elements of the assault and unlawful imprisonment charges.[110] This determination was likely driven by the fact that the critical area of testimony directly addressed elements of the crimes. Contrast this analysis with that of the Court in *People v. Bedessie*, also discussed above, where although expert testimony regarding false confessions was held to have been properly excluded due to a lack of relevance and proper foundation, the Court used language suggesting a more liberal admission of expert testimony to aid, educate, and explain to the jury personality factors and interrogation techniques, with the caveat that an "expert may not testify as to whether a particular defendant's confession was or was not reliable."[111]

In certain cases, expert testimony is indeed necessary to support a claim or cause of action. For example, the failure to provide expert testimony with regard to an informed consent cause of action, in the context of a medical malpractice lawsuit, is fatal to succeeding on such a claim at trial.[112]

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106. *See id.* at 307-08, 457 N.E.2d at 723, 469 N.Y.S.2d at 617 (suggesting that the admissibility standard is properly qualified and relevant expert testimony that would be useful to "aid the jury" in evaluating an issue).

107. 10 A.D.3d 478, 478, 954 N.Y.S.2d 866, 867 (1st Dep't 2012).

108. *Id.*

109. *Id.*

110. 18 N.Y.3d 145, 155-56, 961 N.E.2d 634, 640, 938 N.Y.S.2d 243, 249 (2011).

111. 19 N.Y.3d 147, 161, 970 N.E.2d 380, 389, 947 N.Y.S.2d 357, 366 (2012).

112. Evart v. Park Ave. Chiropractic, P.C., 86 A.D.3d 442, 443, 926 N.Y.S.2d 491, 493 (1st Dep't 2011).

Expert testimony would likewise seem to be required in a premises liability, trip and fall case, relying upon a theory that the plaintiff fell or missed his or her step as a result of "optical confusion."[113] In *Saretsky v. 85 Kenmare Realty Corp.*,[114] the court recognized the validity of the concept of "optical confusion."[115] Reversing summary judgment in favor of the defendant property owners, the court held that the motion court erred when it failed to give proper consideration to an expert engineer's affidavit in support of the plaintiff's theory of "optical confusion."[116] The court noted that the expert's affidavit contained sufficient factual foundation to support the opinions expressed and that such affidavit created an issue of fact.[117]

Conversely, sometimes in routine civil negligence cases, expert testimony has been determined by the trial court to be unnecessary. In *Christofaratos v. City of New York*, the plaintiff appealed a jury verdict in favor of the defendants, arguing that he was unfairly precluded at trial from offering an expert on the issue of the placement of a portable restroom in a location where access required walking on grass rather than a paved surface.[118] The plaintiff contended that the expert testimony was necessary to support his theory that he was caused to slip and fall on slippery grass on his way to the restroom.[119] In rejecting this argument and affirming the verdict below, the court recognized, with laudable common sense, that the placement of a portable restroom in an area where the grassy access path could become wet and muddy after rainfall is not something beyond the understanding of a typical juror, and therefore requiring of expert testimony.[120]

In *Alexander v. Dunlop Tire Corp.*, the Third Department reinforced the fact that a *Frye* hearing is required only when the opponent is challenging a novel scientific theory.[121] In that case, the plaintiff's expert reached his determinations based upon a process of elimination methodology to support the plaintiff's theories of liability, that a tire tread separation and failure resulted in a fatal single-car,

113. Saretsky v. 85 Kenmare Realty Corp., 85 A.D.3d 89, 92, 924 N.Y.S.2d 32, 34 (1st Dep't 2011).

114. *Id.* at 89, 924 N.Y.S.2d at 32.

115. *Id.* at 92, 924 N.Y.S.2d at 34.

116. *Id.* at 92-93, 924 N.Y.S.2d at 34-35.

117. *See id.*, 924 N.Y.S.2d at 34.

118. 90 A.D.3d 970, 970-71, 935 N.Y.S.2d 641, 642-43 (2d Dep't 2011).

119. *Id.* at 970-71, 935 N.Y.S.2d at 643.

120. *Id.*

121. 81 A.D.3d 1134, 1135, 917 N.Y.S.2d 376, 378 (3d Dep't 2011).

rollover accident.[122] The defendant had moved for an order excluding the plaintiff's expert's testimony and granting the defendant summary judgment based upon the plaintiff's inability to establish her case.[123]

On appeal, the defendant challenged the reliability of the expert's conclusion that the tread separation resulted from a defect in the manufacturing process.[124] The court reviewed the methodology used by the expert in determining the potential causes of tread separation failure.[125] The court noted that his methodology was by process of elimination, which was not a novel scientific theory requiring a *Frye* hearing.[126]

Moreover, the expert's methodology was thorough and detailed.[127] The expert testified at a deposition that as to his examination and evaluation of data, he excluded common potential causes of tread separation failure (aside from manufacturing defect), including "mounting damage, alignment damage, improper repair, improper storage, age of the tire, operation in excess of the tire's speed rating and over deflection," along with reasoning in connection with each opinion.[128] In addition, through his inspection, he eliminated all possible causes of tire separation as set forth by the Tire Institute of America in its passenger and light truck tire conditions manual.[129]

The expert also testified that he was unaware of any other causes of tread separation that he had not examined and excluded,[130] and that therefore, by process of elimination, he concluded that manufacturing defect was the culprit.[131] In reversing the grant of summary judgment to the defendant, the court determined that the plaintiff's expert's testimony was sufficient to circumstantially prove a claim of manufacturing defect.[132] Notwithstanding the fact that the plaintiff's expert could not identify a specific defect, he eliminated all other possible causes for the product's failure, and established that the product did not perform as intended, as required by *Speller v. Sears,*

122. *Id.* at 1135, 917 N.Y.S.2d at 378.
123. *Id.* at 1135, 917 N.Y.S.2d at 377-78.
124. *Id.* at 1135, 917 N.Y.S.2d at 378.
125. *See generally id.* at 1134, 917 N.Y.S.2d at 378.
126. *Alexander*, 81 A.D.3d at 1135, 917 N.Y.S.2d at 378.
127. *See id.* at 1135, 917 N.Y.S.2d at 378.
128. *Id.* at 1136, 917 N.Y.S.2d at 378-79.
129. *Id.*
130. *Id.*, 917 N.Y.S.2d at 379.
131. *Alexander*, 81 A.D.3d at 1136, 917 N.Y.S.2d at 379.
132. *Id.* at 1137, 917 N.Y.S.2d at 379.

Roebuck & Co.[133]

F. Expert Qualifications

Trial courts are similarly vested with discretion to assess whether an expert possesses the requisite qualifications to testify on a given topic. Courts generally allow experts to testify if they possess sufficient education, training, and work experience to be considered adequately qualified to aid and assist the jury. In *Melo v. Morm Management Co.*, the First Department approved of the trial court's exercise of discretion in allowing the plaintiff's expert to offer opinions in the area of safety engineering based upon his training and experience, even though he was not a licensed engineer.[134] Meanwhile, the Fourth Department, in *People v. Wyant*, held that it was reversible error for the court to dismiss a murder charge on the basis that the prosecution's expert lacked proper qualifications to offer an opinion as to the cause of death.[135] The Fourth Department noted that the physician was licensed, had training in forensic pathology, and had performed just under 500 autopsies in her career.[136]

The issue of whether an expert is properly qualified in a particular medical specialty is often raised in the context of medical malpractice lawsuits. On a motion for summary judgment, the First Department in *Martino v. Bendo* approved of the plaintiff's use of an affidavit from a board certified orthopedic surgeon, specializing in joint replacements, who offered his opinion that the defendant deviated from accepted medical standards in performing spinal surgery on the plaintiff.[137] On appeal, the defendant objected to the qualification of the plaintiff's expert, arguing that he was not a specialist in spinal surgery.[138] The First Department disagreed, finding that the court below properly exercised its discretion in considering the expert's affidavit and opinions.[139] Moreover, the court determined that the plaintiff's expert had training in spinal surgery, had practiced as an orthopedic surgeon for thirty years, and his findings were "detailed, based upon the

133. *Id.* at 1135-36, 1137, 917 N.Y.S.2d at 378, 379 (citing Speller v. Sears, Roebuck & Co., 100 N.Y.2d 38, 41, 790 N.E.2d 252, 254-55, 760 N.Y.S.2d 79, 81-82 (2003)) (proof of manufacturing defect by circumstantial evidence).

134. 93 A.D.3d 499, 499-500, 940 N.Y.S.2d 83, 85 (1st Dep't 2012).

135. 98 A.D.3d 1277, 1277-78, 951 N.Y.S.2d 294, 295-96 (4th Dep't 2012).

136. *Id.* at 1278, 951 N.Y.S.2d at 296.

137. 93 A.D.3d 500, 501, 940 N.Y.S.2d 253, 254 (1st Dep't 2012).

138. *Id.*, 940 N.Y.S.2d at 253-54.

139. *Id.*, 940 N.Y.S.2d at 254.

evidence, and not challenged by the defendant."[140]

G. Expert Opinion Evidence on Summary Judgment Motions

1. The Second Department Clarifies: An Expert Need Not Be Disclosed Prior to Filing the Note of Issue in Order to Be Considered on a Motion for Summary Judgment.

In *Rivers v. Birnbaum*, a case of significant practical import, the Second Department cleared up some confusion about whether, on motions for summary judgment, a court can consider affidavits from experts who have not been disclosed pursuant to a C.P.L.R. 3101(d) demand, prior to the filing of the note of issue.[141] The Second Department cited a number of its prior decisions for the proposition that

> some of our decisions may be interpreted as . . . setting forth a bright-line rule in which expert disclosure pursuant to C.P.L.R. 3101(d)(1)(i) is untimely if it is made after the filing of the note of issue and certificate of readiness and, thus, in the absence of a valid excuse for such a delay, a court must preclude an affidavit or affirmation from an expert whose identity is disclosed for the first time as part of a motion for summary judgment.[142]

In *Rivers*, the Second Department reinvested the trial courts with discretion on summary judgment motions to consider affidavits from experts not previously disclosed.[143]

Thus, the rule going forward, at least in the Second Department, is that the disclosure of an expert subsequent to the filing of the "note of issue" does not "by itself" render the disclosure untimely; it is simply "one factor" in determining whether disclosure is untimely.[144] A court may still "in its discretion" consider an expert's affidavit submitted in the context of a motion for summary judgment or, it may do so and impose an appropriate sanction.[145] The option of sanctions arose from the courts' recognition that in certain cases scheduling orders provide for specific deadlines for expert disclosure, and in such cases, courts have discretion, pursuant to C.P.L.R. 3126, to impose appropriate sanctions for missing the deadline.[146]

The court in *Rivers* did not, however, clarify an issue raised by the

140. *Id.*
141. 102 A.D.3d 26, 30-31, 953 N.Y.S.2d 232, 235 (2d Dep't 2012).
142. *Id.* at 41, 953 N.Y.S.2d at 242.
143. *Id.* at 42-43, 953 N.Y.S.2d at 244.
144. *Id.* at 41, 953 N.Y.S.2d at 242-243.
145. *Id.* at 41, 953 N.Y.S.2d at 243.
146. *Rivers*, 102 A.D.3d at 42, 953 N.Y.S.2d at 244.

dissent in *Construction by Singletree, Inc. v. Lowe* (one of the court's prior decisions on this topic), that is the proposition that C.P.L.R. 3101(d)(1) applies to disclosure of trial experts, and that parties are, or should be, free to retain experts for other purposes, including consulting, and providing reports and/or affidavits in connection with summary judgment motions.[147] In his dissent in *Construction by Singletree, Inc.*, Judge Carni, now sitting on the Fourth Department, expressed his opinion that nothing in C.P.L.R. 3101(d)(1) indicates that the disclosure requirement applies to anything other than trial experts.[148] A plain reading of the statute reveals this to be true.[149]

2. Foundation for an Expert's Opinions

Courts have been turning a keen eye to the foundation offered for expert opinions submitted in opposing or supporting summary judgment motions. Increasingly, courts have been enforcing the requirement that an expert's affidavit refer to facts from the record supporting each opinion, and that the expert's opinions address each of the relevant alleged claims or defenses. This necessarily results in a paper "battle of the experts" which should be an analysis of whether the opinions are properly supported by facts.

Examples of this judicial analysis abound. If an expert is offering opinions which appear, on the surface, to be outside of his or her area of specialization, a proper foundation must be laid supporting a finding that he has the knowledge, experience, and training to offer the opinions set forth in the affidavit. As noted in the above section regarding qualifications, there is no impediment for an expert to offer opinions outside of his or her area of expertise, so long as there is sufficient demonstration by way of training, experience, research, etc., that establishes the reliability of the opinions offered.[150]

When an affidavit is submitted on behalf of the movant, care must be exercised to ensure that the expert's opinion is not at variance with the facts in the moving papers. For example, in *Copeland v. Bolton*, an automobile negligence case, the defendant-movant submitted an accident reconstruction expert's affidavit in support of his motion for summary judgment.[151] The plaintiff alleged that he was struck twice

147. 55 A.D.3d 861, 863, 865, 866 N.Y.S.2d 702, 702, 705 (2d Dep't 2008).

148. *Id.* at 865, 866 N.Y.S.2d at 705.

149. N.Y. C.P.L.R. 3101(d)(1) (McKinney Supp. 2013).

150. *See* Bey v. Neuman, 100 A.D.3d 581, 582, 953 N.Y.S.2d 266, 268 (2d Dep't 2012) (no proper foundation in expert's affidavit for out-of-state orthopedic surgeon to express opinion as to deviation from standards of accepted radiologic practice).

151. 101 A.D.3d 1283, 1284-85, 956 N.Y.S.2d 231, 231-32 (3d Dep't 2012).

when he attempted to cross two northbound lanes of a highway; first, by a northbound vehicle in the furthest right hand lane; and second, as he lay in the adjacent northbound lane, by a vehicle driven by the defendant-movant.[152]

The defendant-operator of the second vehicle moved for summary judgment based upon the emergency doctrine, taking the position that he had no opportunity to avoid the accident.[153] His motion was supported by an affidavit from an accident reconstruction expert, as well as his own deposition testimony.[154]

The Third Department affirmed the denial of summary judgment, noting that the expert's affidavit lacked proper factual foundation and was non-probative.[155] There was no dispute that the circumstances facing the movant constituted an emergency; however, the expert's conclusion that the defendant had no opportunity to avoid hitting the plaintiff as he lay in the northbound lane, was based, in part, on an incorrect assumption that the defendant was traveling at the forty-five mile an hour speed limit.[156] This assumption was contradicted by other facts in the record, including the defendant's own testimony that he was traveling slower than the speed limit at the time of impact.[157] Based upon this factual discrepancy, the court found that the expert's opinion had no probative value and summary judgment was properly denied.[158] The lesson here is to make sure that expert's opinions are fully supported by the other proof submitted in support of a motion for summary judgment.

In *DeJesus v. Mishra*, the First Department carefully scrutinized the proof submitted by the plaintiff in opposition to a motion for summary judgment in a novel theory medical malpractice case.[159] The plaintiff alleged that the defendant's physician should not have proceeded with an emergency caesarian section, ordered based upon a diagnosis of fetal distress, because during the intervening minutes between the diagnosis of fetal distress and commencement of the operation it appeared that the fetus may have died.[160] The plaintiff contended that it was malpractice for the physician to continue with the

152. *Id.* at 1284, 956 N.Y.S.2d at 231.
153. *Id.* at 1285, 956 N.Y.S.2d at 232.
154. *Id.*
155. *Id.*, 956 N.Y.S.2d at 232-33.
156. *Copeland*, 101 A.D.3d at 1285, 956 N.Y.S.2d at 232.
157. *Id.* at 1285, 956 N.Y.S.2d at 232.
158. *Id.*
159. 93 A.D.3d 135, 139, 939 N.Y.S.2d 403, 406 (1st Dep't 2012).
160. *Id.* at 137-38, 939 N.Y.S.2d at 405.

surgical procedure with all of its potential complications and risks (the plaintiff in this case did not suffer any such complications and risks).[161]

Affirming summary judgment in favor of the defendant, the First Department noted that, notwithstanding the well-accepted principle that summary judgment is generally denied when parties medical experts disagree, the preliminary question before such a conclusion is reached by the court is whether the opinions offered by the opponent to the motion contain sufficient foundation to raise an issue of fact.[162] The court determined that there were no facts to support that it was a departure from generally accepted medical practice to fail to halt a caesarian section in the face of indications that the fetus may have died between the time the procedure was ordered and when it was actually performed.[163] Accordingly, the court held that there was not a proper foundation to support the plaintiff's expert's opinion.[164]

Courts reviewing the foundational sufficiency of expert opinions in medical malpractice lawsuits have required that the expert opinions be specific as to both departure and proximate cause. In *Foster-Sturrup v. Long*, another novel theory medical malpractice case, the First Department found that the plaintiff's expert's affirmation submitted in opposition to summary judgment was "conclusory," and failed to specifically address the opinions and the information contained in the detailed affirmation submitted by the defendant's expert.[165]

The plaintiff in *Foster-Sturrup* alleged that the defendant failed to timely diagnose an ectopic pregnancy.[166] In support of the defendant's motion for summary judgment, the defendant's expert opined that the defendant's treatment was in accordance with good and accepted medical practice.[167] The expert further opined that the alleged departure was not a proximate cause of any injury.[168] If a blood pregnancy test had been done at the time the plaintiff claimed it should have been, her blood hormone levels would not have definitively indicated pregnancy, and she had no other signs or symptoms of pregnancy.[169] The expert also offered the opinion that by the time the plaintiff did show signs and symptoms of pregnancy, when she was seen in the emergency room

161. *Id.* at 138, 939 N.Y.S.2d at 405.
162. *Id.*, 939 N.Y.S.2d at 406.
163. *Id.* at 139, 939 N.Y.S.2d at 406-07.
164. *De Jesus*, 93 A.D.3d at 138, 939 N.Y.S.2d at 406.
165. 95 A.D.3d 726, 728, 945 N.Y.S.3d 246, 248-49 (1st Dep't 2012).
166. *Id.* at 727, 945 N.Y.S.2d at 248.
167. *Id.* at 728, 945 N.Y.S.2d at 248.
168. *Id.*
169. *Id.*

complaining of abdominal pain, the emergency room doctors could not determine, even with the use of an ultrasound, the location of the ectopic pregnancy.[170] Exploratory surgery was required to determine that the pregnancy had implanted in the appendix, which had subsequently burst.[171]

In response, the plaintiff's expert opined that a blood pregnancy test and an ultrasound, done at an earlier time, would have led to an earlier diagnosis of an ectopic pregnancy.[172] However, he did not explain how it would have been possible to do so, or how an earlier diagnosis of the pregnancy would have changed the result.[173] His affidavit failed to provide any factual support for his opinions and did not create issues of fact as to departure or proximate cause.[174] On this basis, the Second Department granted the defendant's motion for summary judgment and dismissed the complaint.[175]

The requirement that an expert's affidavit contain sufficient factual foundation is not limited to medical malpractice lawsuits. In *Babcock v. County of Albany*, a premises liability case regarding an alleged unsafe property condition, the plaintiff demonstrated that it is possible, in opposing a motion for summary judgment, to provide sufficient factual foundation for an expert's opinion, based on an inspection performed years after the underlying occurrence.[176] The key was providing a sufficient factual foundation to overcome the implications of the passage of time.[177] The plaintiff's expert claimed that the defendant's failure to trim the tree on his property caused the underlying motorcycle accident.[178] The defendant claimed that he had no notice that any of the tree limbs were dangerous.[179]

In opposition to the defendant's motion for summary judgment, the plaintiff submitted an affidavit from an arborist , in which the arborist acknowledged that he had inspected the tree nearly four years after the accident.[180] However, the expert opined that the tree and limb had defects that would have been readily observable at the time of the

170. *Foster Sturrup*, 95 A.D.3d at 728, 945 N.Y.S.2d at 248.
171. *Id.* at 727, 945 N.Y.S.3d at 247.
172. *Id.* at 728, 945 N.Y.S.2d at 249.
173. *Id.* at 729, 945 N.Y.S.2d at 249.
174. *See id.*
175. *Foster Sturrup*, 95 A.D.3d at 726, 729, 945 N.Y.S.2d at 247, 249.
176. 85 A.D.3d 1425, 1426-27, 925 N.Y.S.2d 703, 704-05 (3d Dep't 2011).
177. *Id.* at 1427, 925 N.Y.S.2d at 705.
178. *Id.*
179. *Id.* at 1426, 925 N.Y.S.2d at 704.
180. *Id.* at 1427, 925 N.Y.S.2d at 705.

accident, years earlier.[181] He also offered facts to contradict the defendant's deposition testimony that he had a very limited knowledge of the conditions of the tree limbs and any prior trimming.[182] The expert's affidavit created a fact issue as to whether the defendant had constructive notice of the condition of the limb due to prior trimming and whether he had constructive notice of the defects the expert indicated should have been readily observable from the ground.[183] Here, the plaintiff's expert did his homework and provided sufficient facts from the record to support his opinion in opposition to the defendant's motion for summary judgment.[184]

Several cases addressing discrete issues applicable to expert testimony are worth mentioning, as they serve as reminders of some basic principles. In *State v. 158th Street and Riverside Drive Housing Company, Inc.*, the Third Department noted that the exclusionary rule with respect to fact witnesses, which keeps them out of the courtroom during trial until it is their turn to testify, is not applicable to expert witnesses.[185] In that particular case, the exclusion of the expert was found to have been harmless, not requiring reversal.[186]

A second principle worth repeating is that an expert's affidavit, submitted by a defendant-movant on a motion for summary judgment, should address each material claim of negligence raised in the plaintiff's Bill of Particulars. The failure to address all material and relevant claims requires denial of the motion.[187]

There was also a reminder that if during jury deliberation, jurors submit questions regarding expert testimony, the proper procedure is to read back the relevant testimony from the expert, and not for the court to offer its own interpretation of the testimony.[188] Also, an expert's testimony at trial must be based upon documents in evidence or previously disclosed to the plaintiff pursuant to a request.[189] Where an expert testifies materially about evidence and documents not exchanged through the course of discovery, it may be found that the plaintiff was

181. *Babcock*, 85 A.D.3d at 1426, 925 N.Y.S.2d at 704.

182. *Id.* at 1426-27, 925 N.Y.S.2d at 704-05.

183. *Id.* at 1427, 925 N.Y.S.2d at 705.

184. *Id.*

185. 100 A.D.3d 1293, 1299, 956 N.Y.S.2d 196, 202 (3d Dep't 2012).

186. *Id.*

187. Payne v. Buffalo Gen. Hosp., 96 A.D.3d 1628, 1630, 947 N.Y.S.2d 282, 285 (4th Dep't 2012).

188. Maiorani v. Adessa Corp., 83 A.D.3d 669, 673, 921 N.Y.S.2d 255, 259 (2d Dep't 2011).

189. *Id.* at 672, 921 N.Y.S.2d at 259.

prejudiced and deprived of the opportunity to review and use the documents at trial, requiring and warranting a new trial.[190]

II. EVIDENCE OF UNCHARGED CRIMES AND PRIOR BAD ACTS

This *Survey* year, the Court of Appeals also decided several cases involving the admissibility of prior uncharged crimes and bad acts under the *Molineux* exception.[191] In *People v. Gamble*, the Court addressed whether it was error to permit the prosecution in a multiple count murder case to introduce evidence of the defendant's uncharged crimes and other prior bad acts where the evidence tended to show a course of conduct towards the victims.[192] There, the defendant was convicted for the shooting deaths of an acquaintance and her two adult children, who were also his upstairs neighbors.[193] His conviction was affirmed by the First Department.[194]

At trial, the prosecution was permitted to elicit testimony from the victim's daughter that one year earlier, the defendant had come to the victim's apartment and threatened to kill her and her boyfriend.[195] The boyfriend was permitted to testify to a verbal altercation instigated by the defendant a couple of months earlier, where the defendant threatened the victim's son, one of the deceased, and displayed what appeared to be a handgun.[196] The prosecution also presented circumstantial evidence linking the defendant to the shootings, including fingerprint evidence.[197]

In his defense, the defendant took the witness stand, admitting that prior to the shootings he was involved in disputes with various members of the victims' family, as well as one of the witnesses who testified regarding the alleged prior criminal acts.[198] He claimed that the disputes arose because one of the victims had been selling drugs outside of his apartment.[199] He denied the alleged prior threatening behavior towards the victims and the allegation that he was the perpetrator, offered a different version of the events on the date of the shootings,

190. *Id.*
191. *See generally* People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).
192. 18 N.Y.3d 386, 391, 964 N.E.2d 372, 373, 941 N.Y.S.2d 1, 2 (2012).
193. *Id.*
194. *Id.* at 396, 964 N.E.2d at 377, 941 N.Y.S.2d at 6 (citing People v. Gamble, 72 A.D.3d 544, 545, 899 N.Y.S.2d 207, 208 (1st Dep't 2010)).
195. *Gamble*, 18 N.Y.3d at 392, 964 N.E.2d at 374, 941 N.Y.S.2d at 3.
196. *Id.*
197. *Id.* at 393-94, 964 N.E.2d at 375-76, 941 N.Y.S.2d at 4-5.
198. *Id.* at 395, 964 N.E.2d at 376, 941 N.Y.S.2d at 5.
199. *Id.*

and claimed that he had an alibi.[200] He denied setting foot inside the victims' apartment, and also claimed that a fingerprint the police had recovered from a window frame could not be his.[201] The jury rejected the defendant's explanations and convicted him of murder.[202]

The Court of Appeals began its analysis by reiterating the principle that, under *Molineux*, in certain circumstances, evidence of uncharged criminal acts may be used to prove that the defendant is guilty of the charged offense.[203] The circumstances itemized in *Molineux* include when the evidence tends to establish: "(1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan . . . so related to each other that proof of one tends to establish others; or, (5) the identity of persons charged with the commission of the crime on trial."[204] The Court emphasized that this list is non-exhaustive, and the guiding principle is that "evidence of defendant's other crimes is admissible only if probative of some fact at issue other than the defendant's criminal propensity."[205]

The Court affirmed the appellate division's decision and the defendant's conviction below, holding that the supreme court properly exercised its discretion in permitting the witnesses to testify about the limited instances of previous uncharged criminal activity that took place prior to the shootings.[206] The Court reasoned that the testimony that the defendant had previously threatened to kill the victims was relevant in establishing a motive for the murders, as well as the identity of the perpetrator in this circumstantial case.[207] In light of the defendant's own testimony denying that he was even in the victims' apartment on the night of the shootings, such evidence had probative value independent of criminal propensity.[208]

In *People v. Cass*, the Court addressed the issue of whether *Molineux* evidence could be used by the prosecution to rebut a defense of extreme emotional disturbance in a murder trial.[209] Although the

200. *Gamble*, 18 N.Y.3d at 395, 964 N.E.2d at 376, 941 N.Y.S.2d at 5.

201. *Id.* at 395, 964 N.E.2d at 377, 941 N.Y.S.2d at 6.

202. *Id.*

203. *Id.* at 391, 964 N.E.2d at 373, 941 N.Y.S.2d at 2 (citing People v. Molineux, 168 N.Y. 264, 264, 61 N.E. 286, 286 (1901)).

204. *Gamble*, 18 N.Y.3d at 397-98, 964 N.E.2d at 378, 941 N.Y.S.2d at 7 (citing *Molineux*, 168 N.Y. at 293, 61 N.E. at 294).

205. *Gamble*, 18 N.Y.3d at 398, 964 N.E.2d at 378, 941 N.Y.S.2d at 7.

206. *Id.*

207. *Id.*

208. *Cf. id.*

209. People v. Cass, 18 N.Y.3d 553, 555, 965 N.E.2d 918, 921, 942 N.Y.S.2d 416, 419 (2012).

Court had previously considered the use of such evidence to rebut defenses based upon a criminal defendant's impaired state of mind under other circumstances, this was an issue of first impression.[210]

At his murder trial, the defendant offered proof, by way of a post-arrest statement to police, that he had been subjected to sexual abuse by his father over an extended period of time.[211] He also admitted that he strangled the victim, his roommate, Victor Dombrova, saying he "lost it" and "snapped" when the victim grabbed his genitals and made other sexual advances toward him during their argument.[212] Based on these facts, he asserted the defense of extreme emotional disturbance, which, if successful, would mitigate his murder charge to manslaughter.[213] To rebut this evidence, the prosecutor moved in limine, pursuant to *Molineux*, for permission to introduce evidence of a statement made by the defendant with respect to a homicide fourteen months earlier.[214] In that statement, the defendant admitted to stabbing Kevin Bosinski after meeting him in a bar and falling asleep in his apartment.[215] The defendant claimed that he awoke and found Bosinski on top of him, kissing and fondling him, and he "completely lost control" and began strangling him.[216] The prosecution was allowed to introduce these statements at trial, with the court finding that the defendant placed his state of mind in issue, that the evidence tended to counter the defendant's extreme emotional disturbance defense, and that the statement tended to show a premeditated intent to target gay men.[217] The defendant claimed that such evidence did not rebut his extreme emotional disturbance defense, but rather showed that he "snapped" when confronted with two separate acts of sexual aggression.[218] The jury rejected the extreme emotional disturbance defense and convicted the defendant of murder in the second degree.[219] On appeal, the defendant argued that his statement regarding the previous Bosinski homicide was inadmissible under *Molineux*, because it had no direct or logical tendency to rebut his extreme emotional disturbance defense.[220]

210. *Id.* at 555-56, 965 N.E.2d at 921, 942 N.Y.S.2d at 419.
211. *Id.* at 556, 965 N.E.2d at 921, 942 N.Y.S.2d at 419.
212. *Id.*
213. *Id.* at 556-57, 965 N.E.2d at 921-22, 942 N.Y.S.2d at 419, 419-20.
214. *Cass*, 18 N.Y.3d at 557, 965 N.E.2d at 922, 942 N.Y.S.2d at 420.
215. *Id.* at 556, 557, 965 N.E.2d at 922, 942 N.Y.S.2d at 420.
216. *Id.* at 556-57, 965 N.E.2d at 922, 942 N.Y.S.2d at 420.
217. *Id.* at 557, 965 N.E.2d at 922, 942 N.Y.S.2d at 420.
218. *Id.* at 558, 965 N.E.2d at 922, 942 N.Y.S.2d at 421.
219. *Cass*, 18 N.Y.3d at 558, 965 N.E.2d at 923, 942 N.Y.S.2d at 421.
220. *Id.*

The Court of Appeals began its analysis with a review of the *Molineux* case law, and reiterated the basic precept that *Molineux* precludes evidence of a defendant's uncharged crimes or prior bad acts if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate propensity to commit the crime charged.[221] The idea behind the *Molineux* rule was to eliminate the risk that a jury would convict a defendant based not upon the evidence of the crime charged, but upon the impression that the defendant's conduct generally warrants punishment.[222]

The Court also reviewed the elements of extreme emotional disturbance, reiterating that a defendant must first establish that he acted under extreme emotional disturbance, which is, by its nature, a subjective determination, and secondly, there must be a reasonable explanation for the defendant's emotional disturbance.[223] The Court concluded that by asserting the defense of extreme emotional disturbance, the defendant had put his state of mind in issue.[224] As such, the Court noted that "[w]e have held that where a defendant puts an affirmative fact—such as a claim regarding his/her state of mind—in issue, evidence of other uncharged crimes or prior bad acts may be admitted to rebut such fact."[225]

The Court also addressed whether the prosecution's use of *Molineux* evidence to rebut a defense based upon extreme emotional disturbance comported with the Court's decision in *Santarelli*, a case involving a defense of temporary insanity.[226] In *Santarelli*, the Court held that proof of prior criminal or bad acts is admissible only if it has some "logical relationship" to, and a "direct bearing upon," the prosecution's effort on rebuttal to disprove the insanity defense.[227] Furthermore, the trial court must ensure that the evidence bears a relationship to the issue and that its probative value outweighs the potential for prejudice.[228]

Applying these principles in *Cass*, the Court held that admitting

221. *Id.* at 559, 965 N.E.2d at 923, 942 N.Y.S.2d at 421.

222. *Id.*, 965 N.E.2d at 924, 942 N.Y.S.2d at 422 (citing People v. Alweiss, 48 N.Y.2d 40, 46, 396 N.E.2d 735, 738, 421 N.Y.S.2d 341, 344 (1979)).

223. *Cass*, 18 N.Y.3d at 561, 965 N.E.2d at 925, 942 N.Y.S.2d at 423.

224. *Id.*

225. *Id.* (citing People v. Alvino, 71 N.Y.2d 233, 247, 519 N.E.2d 808, 816, 525 N.Y.S.2d 7, 15 (1987)).

226. *See generally* People v. Santarelli, 49 N.Y.2d 241, 401 N.E.2d 199, 425 N.Y.S.2d 77 (1980).

227. *Id.* at 249, 252, 401 N.E.2d at 204, 206, 425 N.Y.S.2d at 82, 84.

228. *Cass*, 18 N.Y.3d at 563, 965 N.E.2d at 926, 942 N.Y.S.2d at 424.

evidence of a prior homicide was consistent with *Santarelli*, and was proper.[229] The evidence was directly relevant to rebutting the defendant's claim that he was acting under extreme emotional disturbance, and tended to support the prosecution's theory that the defendant targeted gay men.[230] Both homicides involved gay men and alleged sexual advances.[231] The Court also found that the defendant had placed his state of mind squarely in issue, allowing the jury to properly consider whether the prior homicide was consistent with his defense of extreme emotional disturbance at trial.[232]

In *People v. Agina*, a case decided the same day as *Cass*, the Court held that it was proper to admit *Molineux* evidence of uncharged crimes in a case of domestic assault where the defendant denied he was the perpetrator.[233] There, the assaults and threatened assaults of the victim, the defendant's wife, took place over the course of two days.[234] At a *Molineux* hearing, the prosecution sought permission to present testimony from the defendant's ex-wife about an incident that occurred fifteen months previously.[235] This application was granted and the ex-wife testified that the defendant had accused her of cheating on him, threatened her with a knife, grabbed her, choked her, tied her wrists and ankles, and told her she was going to die.[236]

The Second Department reversed the defendant's conviction, holding that the ex-wife's testimony should not have been admitted because the defendant's identity was not at issue in the trial, and therefore, her testimony served no purpose other than to enhance the credibility of the complainant.[237] The Court of Appeals disagreed, finding that the testimony of the ex-wife was directly relevant to the issue of the identity of the perpetrator, as the defendant himself placed that in issue by denying it was him.[238] The case was remanded to the appellate division for further consideration of whether the identity exception was applicable to these facts, and to resolve any other open

229. *Id.* at 563, 965 N.E.2d at 926, 942 N.Y.S.2d at 424.
230. *Id.*
231. *Id.*
232. *Id.* at 561, 965 N.E.2d at 925, 942 N.Y.S.2d at 424.
233. People v. Agina, 18 N.Y.3d 600, 602, 965 N.E.2d 913, 914, 942 N.Y.S.2d 411, 412 (2012).
234. *See id.*
235. *Id.*
236. *Id.*
237. *Id.* at 602-03, 965 N.E.2d at 914, 942 N.Y.S.2d at 412.
238. *Agina*, 18 N.Y.3d at 604, 965 N.E.2d at 915, 942 N.Y.S.2d at 413.

issues.[239]

In *People v. Bradley*, an opinion by Chief Judge Lippman, the Court approved of the use of *Molineux* evidence to rebut the defense that the fatal stabbing of the defendant's estranged boyfriend was in self-defense, and was a response influenced by a history of physical and sexual abuse since childhood, as well as battered woman syndrome.[240]

Specifically at issue was the testimony of a social worker called by the prosecution to testify regarding notes from her encounter with the defendant, who told her that ten years earlier she stabbed (non-fatally) a man who had been harassing her, and also that she was "very angry toward men."[241] The prosecution's theory was that the fatal stabbing of her ex-boyfriend had, like the previous one, been motivated by anger, and not by a reasonably perceived need to resort to deadly force, an element required to establish self-defense.[242]

The Court of Appeals reversed and ordered a new trial, determining that the proffered *Molineux* evidence did not have a "natural tendency" to disprove the defendant's specific claim as to her state of mind.[243] The Court reasoned that while such evidence may have proved that the defendant was angry with men in general, it did not prove that she was angry with her ex-boyfriend in the moments before she stabbed him.[244] Moreover, the Court reasoned that being angry with men was not mutually exclusive of a fear for her own personal safety at the time of the fatal stabbing.[245]

Also, the Court noted that the prior incident was remote in time, more than ten years earlier.[246] Aside from the notes from the social worker's records, there were no additional facts developed that established the relevance of the two incidents in relation to each other.[247] "The testimony as to the [previous] stabbing did not, in any reasonably disciplined way, tend to disprove defendant's claim that she had used a knife against [the victim] to defend herself from what she

239. *Id.* at 605, 965 N.E.2d at 916, 942 N.Y.S.2d at 414.

240. *People v. Bradley*, 20 N.Y.3d 128, 135-36, 982 N.E.2d 570, 574, 958 N.Y.S.2d 650, 654 (2012).

241. *Id.* at 132, 982 N.E.2d at 571, 958 N.Y.S.2d at 651.

242. *Id.*

243. *Id.* at 134, 982 N.E.2d at 573, 958 N.Y.S.2d at 653 (quoting People v. Santarelli, 49 N.Y.2d 241, 249, 401 N.E.2d 199, 204, 425 N.Y.S.2d 77, 82 (1980)).

244. *See Bradley*, 20 N.Y.2d at 134-35, 982 N.E.2d at 573-74, 958 N.Y.S.2d at 653-54.

245. *Id.* at 136, 982 N.E.2d at 574, 958 N.Y.S.2d at 654.

246. *Id.* at 134-35, 982 N.E.2d at 573-74, 958 N.Y.S.2d at 653-54.

247. *Id.* at 135, 982 N.E.2d at 574, 958 N.Y.S.2d at 654.

reasonably believed would be grievous personal harm."[248]

Important to the Court's rationale in *Bradley* was the existence of objective proof to support the defendant's claim of self-defense.[249] She had an order of protection against her estranged boyfriend related to a prior attack on her.[250] Such evidence directly supported her claim that, at the time she stabbed her estranged boyfriend, she reasonably believed that she was in fear for her life. Such evidence tended to make the stabbing incident from ten years earlier seem more remote, both in time and relevance.[251]

Judge Smith strongly dissented, finding that the defendant's defense essentially amounted to an autobiography and that under such circumstances "the People should be allowed to introduce a bit of her history that casts her in a less favorable light."[252]

III. JUDICIAL NOTICE

Judicial notice is a useful tool in the hands of trial practitioners who seek to introduce evidence from the almost limitless number of facts that now fall within the realm of "common knowledge" due to the internet.

An example of this is found in *People v. Eden*, a criminal case involving a post-plea agreement violation.[253] The Third Department noted in a footnote that a Drug Treatment Court Handbook, relied upon by the People in their brief, though it was not included on the record on appeal, was available "on the official government website for the Unified Court System."[254] Therefore, the court took judicial notice of it, without its formal introduction into evidence.[255] This is one example of the ease with which government publications and other materials available on the internet may be used as evidentiary shortcuts in hearings, trials, appeals, and other court proceedings.

248. *Id.*
249. *Id.* at 134, 982 N.E.2d at 573, 958 N.Y.S.2d at 653.
250. *Bradley*, 20 N.Y.3d at 134, 982 N.E.2d at 573, 958 N.Y.S.2d at 653.
251. *See generally id.*
252. *Id.* at 136, 982 N.E.2d at 575, 958 N.Y.S.2d at 655 (Smith, J., dissenting).
253. *See generally* 95 A.D.3d 1446, 943 N.Y.S.2d 689 (3d Dep't 2012).
254. *Id.* at 1447 n.1, 943 N.Y.S.2d at 690 n.1.
255. *Id.*

IV. PRESUMPTIONS AND OTHER EVIDENTIARY SHORTCUTS

A. *Res Ipsa Loquitur*

The doctrine of res ipsa loquitur, often described and characterized as a presumption, is more of an evidentiary rule that permits an inference of negligence upon certain conditions being met. As recent cases show, there are certain fact patterns that are more amenable to the application of the doctrine, and others for which the application of the doctrine is ultimately futile. The doctrine has seen great utility in elevator malfunction cases where it eases the evidentiary requirements and lessens the burden of proof.

In *Devito v. Centennial Elevator Industries, Inc.*, the Second Department found that although the plaintiff had failed to raise a triable issue of fact as to the defendant's actual or constructive notice of the alleged defective condition of an elevator, the plaintiff did demonstrate a triable issue of fact as to the defendant's liability under res ipsa loquitur, by submitting proof

> . . . that the rapid descent, shaking, and abrupt, misaligned stop of the elevator was an occurrence that would not ordinarily occur in the absence of negligence, that the maintenance and service of the elevator was in the exclusive control of Centennial, and that no act or negligence on the part of plaintiff contributed to the happening of the accident.[256]

The same reasoning and result was found by the First Department in *Bryant v. Boulevard Story LLC*, where summary judgment in favor of the defendant was held to be improper in light of issues of fact regarding the applicability of the doctrine of res ipsa loquitur in an alleged elevator misleveling case.[257] The defendant elevator company was not able to successfully overcome the plaintiff's res ipsa claim by contending that the building owner, a co-defendant, was also in possession and control of the elevator.[258] The court discerned that although the building owner was obviously in possession of the elevator itself, the elevator contracting company was "exclusively responsible" for the maintenance and repair of the elevator.[259]

In a similar vein, in *Fiermonti v. Otis Elevator Company*, the Second Department agreed that the plaintiffs demonstrated a material

256. 90 A.D.3d 595, 596, 933 N.Y.S.2d 871, 871 (2d Dep't 2011) (internal citations omitted).

257. 87 A.D.3d 428, 429, 928 N.Y.S.2d 285, 286 (1st Dep't 2011).

258. *Id.* at 428-29, 928 N.Y.S.2d at 286.

259. *See id.* at 429, 928 N.Y.S.2d at 286.

issue of fact as to the application of the doctrine of res ipsa loquitur upon proof that the sudden misleveling of an elevator would not ordinarily occur in the absence of negligence on the part of the elevator maintenance company, who had exclusive control over the functionality of the elevator, and that the plaintiff did not negligently contribute to the accident.[260]

The doctrine of res ipsa loquitur has been invoked in medical malpractice lawsuits with mixed results. In the context of medical negligence claims, res ipsa loquitur changes the evidentiary requirements in that the plaintiff's expert must offer testimony that the injuries sustained by the plaintiff do not ordinarily occur in the absence of negligence. The plaintiff need not, as is usually required, provide an opinion that the defendant departed from generally accepted standards of medical practice.

The doctrine was successfully applied in *Backus v. Kaleida Health*, a surgical case involving a donor kidney transplant operation in which a jury awarded a damages verdict in favor of the plaintiff.[261] On appeal, the defendants-appellants argued that the trial court erred in instructing the jury on the doctrine of res ipsa loquitur.[262] The Fourth Department noted that the plaintiff's expert testified that the injuries sustained by the plaintiff were not the kind that normally occurred in the absence of negligence.[263] The facts supporting this opinion were that the plaintiff suffered injuries to his neck and to the left side of his body during an operation to harvest a kidney, the surgery took three hours longer than it should have, and during the surgery, the plaintiff was positioned on his left side, with his body angled downward.[264]

Under such facts, the Fourth Department approved the charge of res ipsa loquitur to the jury, noting that such a charge is proper in a medical malpractice lawsuit involving alleged surgical error where "an unexplained injury occurs in an area remote from the operation while the patient is anesthetized."[265] Of note, the defendant-surgeons in *Backus* unsuccessfully argued a lack of exclusive control over the instrumentality causing injury, because an anesthesiologist was also involved in positioning the patient.[266] Rejecting this argument, the court

260. 94 A.D.3d 691, 692, 941 N.Y.S.2d 657, 658 (2d Dep't 2012).

261. *See* 91 A.D.3d 1284, 1284-85, 937 N.Y.S.2d 773, 773-74 (4th Dep't 2012).

262. *Id.* at 1285, 937 N.Y.S.2d at 774.

263. *See id.* at 1285, 937 N.Y.S.2d at 774-75.

264. *Id.* at 1285, 937 N.Y.S.2d at 774-75.

265. *Id.* at 1285, 937 N.Y.S.2d at 775 (quoting Fogal v. Genesee Hosp., 41 A.D.2d 468, 475, 344 N.Y.S.2d 552, 561 (4th Dep't 1973)).

266. *Backus*, 91 A.D.3d at 1286, 937 N.Y.S.2d at 775.

noted that in multiple defendant medical malpractice lawsuits, where the plaintiff is relying upon res ipsa loquitur, "a plaintiff is not required to identify the negligent actor."[267] The court affirmed the jury's verdict of liability in favor of the plaintiff, based upon res ipsa loquitur.[268]

In contrast, the Fourth Department in *James v. Wormuth* found that the doctrine of res ipsa loquitur was not applicable in a medical malpractice lawsuit involving the alleged failure to remove a foreign object from the plaintiff's body during surgery.[269] The plaintiff's theory of liability was that she was injured when the defendant left a wire in her thorax during an operation on her lung.[270] The defendant moved for summary judgment based upon the defendant-physician's deposition testimony that he intentionally left the wire in the plaintiff's thorax, after it became separated from the tissue to which it had been attached during the procedure.[271] The plaintiff opposed the motion, relying upon the doctrine of res ipsa loquitur.[272]

Affirming the order that granted the defendant summary judgment below, the majority in *James* determined that while the doctrine of res ipsa loquitur is applicable in cases where a foreign object is unintentionally left behind following an operative procedure, the plaintiff in this case failed to establish that the wire fragment was unintentionally left behind.[273] Instead, she elicited testimony from the defendant that it was intentionally left behind, and that the physician exercised his judgment to leave it behind, rather than making a larger incision to remove the wire.[274] The court also found that the plaintiff specifically disavowed any theory that the defendant was negligent in losing the wire in the first place.[275] The dissent disagreed as to whether the plaintiff had abandoned this theory , and was of the opinion that the loss of the foreign object during surgery spoke for itself and satisfied the elements of res ipsa loquitur.[276]

The case of *Estrategia Corp. v. Lafayette Commercial Condo*

267. *Id.* at 1286, 937 N.Y.S.2d at 775 (quoting Schmidt v. Buffalo Gen. Hosp., 278 A.D.2d 827, 828, 718 N.Y.S.2d 514, 515 (4th Dep't 2000), *leave denied*, 96 N.Y.2d 710, 750 N.E.2d 75, 726 N.Y.S.2d 373 (2001)).

268. *Backus*, 91 A.D.3d at 1285, 937 N.Y.S.2d at 774.

269. 93 A.D.3d 1290, 1291, 941 N.Y.S.2d 388, 390 (4th Dep't 2012).

270. *Id.*

271. *Id.* at 1290-91, 941 N.Y.S.2d at 390.

272. *Id.* at 1291, 941 N.Y.S.2d at 390.

273. *Id.* at 1292, 941 N.Y.S.2d at 390 (citing LaPietra v. Clinical & Interventional Cardiology Assocs., 6 A.D.3d 1073, 1074, 776 N.Y.S.2d 386, 387 (4th Dep't 2004)).

274. *James*, 93 A.D.3d at 1292, 941 N.Y.S.2d at 390-91.

275. *Id.* at 1292, 941 N.Y.S.2d at 391.

276. *Id.* at 1293, 941 N.Y.S.2d at 392 (Fahey & Sconiers, JJ., dissenting).

addressed both procedural and substantive aspects of the doctrine of res ipsa loquitur in the context of a property damage claim.[277] Procedurally, the First Department held that it was not necessary to plead the doctrine of res ipsa loquitur in one's complaint in order to invoke the doctrine at trial.[278] It was sufficient to plead negligence, along with sufficient facts and circumstances to warrant the doctrine's application.[279] The First Department denied the defendant's motion and the plaintiff's cross-motion for summary judgment, finding that there were issues of fact as to the doctrine of res ipsa loquitur.[280]

The lower court's decision in *Estrategia* is informative as to the substantive application of the doctrine in a case of loss due to substantial property damage, caused by the freezing and subsequent bursting of a sprinkler pipe in a commercial building.[281] Specifically, the lower court noted that cases involving "sprinkler system failures, burst water pipes and water main breaks" are frequent examples of the appropriate application of res ipsa loquitur, as they are occurrences that do not happen in the absence of negligence.[282]

In this *Survey* year, there were also a number of reported personal injury, negligence cases which serve as examples of fact patterns unsuited to the application of the doctrine of res ipsa loquitur. These include cases where: a plaintiff was injured when she fell while returning to her seat on a moving bus;[283] a plaintiff was injured when he fell through a dock;[284] a shower head sprayed water onto a ceiling and bathroom floor, thereby creating a slippery condition and allegedly causing a plaintiff to slip and fall;[285] a piece of equipment used in connection with an x-ray procedure fell onto a plaintiff's forehead while undergoing an x-ray;[286] a stack of bottles fell on a plaintiff while

277. *See generally* 95 A.D.3d 732, 944 N.Y.S.2d 878 (1st Dep't 2012).

278. *Id.*

279. *Id.*

280. *Id.*

281. Estrategia Corp. v. Lafayette Comm. Condo, No. 100147/48, 2011 NY Slip Op. 33405(U), at 1 (Sup. Ct. N.Y. Cnty. Dec. 20, 2011).

282. *Id.* at 14-15.

283. Abrams v. Excellent Bus Serv., Inc., 91 A.D.3d 681, 682, 937 N.Y.S.2d 117, 119 (2d Dep't 2012).

284. Anderson v. Justice, 96 A.D.3d 1446, 1447, 946 N.Y.S.2d 739, 740 (4th Dep't 2012).

285. Anderson v. Skidmore Coll., 94 A.D.3d 1203, 1203, 941 N.Y.S.2d 787, 788 (3d Dep't 2012).

286. Brethour v. Alice Hyde Med. Ctr., 85 A.D.3d 1271, 1271, 924 N.Y.S.2d 620, 622 (3d Dep't 2011).

shopping in a grocery store;[287] a chair collapsed when a plaintiff sat on it;[288] an alleged defective window collapsed and fell onto a plaintiff; [289] a plaintiff received an electric shock when he opened the door of a defendant-variety store;[290] a plaintiff tripped and fell on an alleged defective sidewalk condition;[291] and even where a plaintiff alleged that he was injured when a metal object fell onto the windshield of his car while driving beneath a bridge, causing him to lose control and strike a highway divider.[292]

The lesson to be gleaned from these recent cases is that the doctrine of res ipsa loquitur is best suited to certain genres of cases; such as those involving elevator malfunctions, bursting pipes, and surgical errors where an uninvolved part of the body is inexplicably injured. Satisfying the requisite elements for the doctrine's applicability in the ordinary negligence case is challenging, and often unsuccessful. As a matter of procedural considerations, the applicability of the doctrine of res ipsa loquitur does not require proof of notice of a defective property condition,[293] nor is a plaintiff precluded from relying upon alternative theories of negligence, including the doctrine of res ipsa loquitur. In cases relying upon the doctrine of res ipsa loquitur, negligence is established circumstantially, by proving that the occurrence is not one which would have happened in the absence of negligence, thereby implying negligence.

B. Statutory Presumptions

Most often referred to as presumptions, "statutory presumptions" are evidentiary shortcuts provided by statute that lessen the burden of proof for a party by affording them inferences or rebuttable presumptions to establish necessary elements of a claim or defense. A simple example of a statutory, rebuttable presumption is section 388 of

287. Fontanelli v. Price Chopper Operating Co., 89 A.D.3d 1176, 1176, 931 N.Y.S.2d 800, 801 (3d Dep't 2011).

288. Lawrence v. Rockland Cnty. Bd. of Coop. Educ. Servs., 93 A.D.3d 766, 766, 940 N.Y.S.2d 321, 321-22 (2d Dep't 2012).

289. Pintor v. 122 Water Realty LLC, 90 A.D.3d 449, 450, 933 N.Y.S.2d 679, 680 (1st Dep't 2011).

290. Salazar v. Fives 160th LLC, 91 A.D.3d 523, 523, 937 N.Y.S.2d 38, 39 (1st Dep't 2012).

291. Smith v. City of N.Y., 91 A.D.3d 456, 456, 936 N.Y.S.2d 178, 179 (1st Dep't 2012).

292. Uddin v. City of N.Y., 88 A.D.3d 489, 489, 931 N.Y.S.2d 14, 15 (1st Dep't 2011).

293. *See* Devito v. Centennial Elevator Indus., Inc., 90 A.D.3d 595, 596, 933 N.Y.S.2d 871, 871 (2d Dep't 2011).

the Vehicle and Traffic Law, which creates a strong presumption that the driver of a vehicle is operating it with the owner's consent; such a presumption "can only be rebutted by substantial evidence demonstrating that the vehicle was not operated with the owner's permission."[294] A vehicle owner cannot, as a matter of law, overcome the presumption of permission simply by saying that he did not give consent.[295] Such testimony serves only to create an issue of fact for a jury to decide.[296]

The case of *Vyrtle Trucking Corp. v. Browne* provides an example of the evidentiary showing that is necessary to rebut the presumption of permissive use provided by section 388 of the Vehicle and Traffic Law.[297] There, the defendant submitted proof in support of his motion for summary judgment that his vehicle had been stolen, was involved in a high speed chase with the police prior to the collision with the plaintiff's vehicle, and furthermore, that the unknown driver of the vehicle had fled the scene on foot.[298] Such a strong showing was not only sufficient to rebut the presumption of permissive use, but entitled the defendant to summary judgment as a matter of law.[299]

The application of a statutory presumption in a vehicular manslaughter case was addressed by the Third Department in *People v. Stickler*.[300] There, the defendant challenged the constitutionality of the rebuttable presumption in Penal Law section 125.12, which defines vehicular manslaughter.[301] Specifically, he objected to the language that provides that if a defendant was unlawfully intoxicated or impaired while operating a vehicle, "there shall be a rebuttable presumption that as a result of such intoxication . . . [the defendant] operated the motor vehicle . . . in a manner that caused such death."[302] The defendant argued that this rebuttable presumption unconstitutionally relieved the prosecution of their burden of proof regarding causation, that is, that intoxication was the cause of the accident which resulted in a person's

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294. Marino v. City of N.Y., 95 A.D.3d 840, 841, 943 N.Y.S.2d 564, 566 (2d Dep't 2012).

295. *Marino*, 95 A.D.3d at 841, 943 N.Y.S.2d at 566 (citing Amex Assurance Co. v. Kulka, 67 A.D.3d 614, 615, 888 N.Y.S.2d 577, 579 (2d Dep't 2009)).

296. *Marino*, 95 A.D.3d at 841, 943 N.Y.S.2d at 566.

297. 93 A.D.3d 716, 717, 940 N.Y.S.2d 279, 280 (2d Dep't 2012).

298. *Id.* at 717, 940 N.Y.S.2d at 281.

299. *Id.* at 717, 940 N.Y.S.2d at 280.

300. 97 A.D.3d 854, 855, 948 N.Y.S.2d 696, 699 (3d Dep't 2012).

301. *Id.*

302. *Id.* at 855, 948 N.Y.S.2d at 699 (quoting N.Y. PENAL LAW § 125.12(3) (McKinney Supp. 2013)).

death.[303]

In confirming the constitutionality of the statute, the court noted that to trigger the presumption, the statute first requires that there be proof that the defendant caused the death of another person while operating a motor vehicle.[304] Proof of intoxication while operating a motor vehicle simply provides a rebuttable presumption that the intoxication or impairment caused the serious injury or death.[305] A rebuttable presumption shifts the burden of proof, but does not eliminate a requisite element of the criminal act.[306] Moreover, as a "permissive presumption," the fact finder was not required to accept the presumed facts, but was merely allowed to do so.[307]

Addressing a further procedural aspect of application of the statutory presumption, the Third Department reversed the conviction and remanded the matter for further proceedings because the trial court treated the statutory presumption as a mandatory, rather than a permissive, presumption.[308] Since this was a non-jury trial, and the trial court was the fact finder, this presumably will require a review of the evidence and the application of the presumption to determine if the evidence so supported it. A specific finding must be made as to whether, as a result of intoxication, the defendant operated his vehicle in a manner that caused the victim's death.[309]

Another similar statutory presumption is found in Vehicle and Traffic Law section 1194(2)(f), which allows the prosecution to introduce, as evidence of guilt, the fact that a defendant charged with driving while intoxicated refused to take a chemical breath test when requested to do so by law enforcement.[310] In *People v. Smith*, the Court of Appeals addressed a defendant's contention that law enforcement did not acquiesce to his request to speak to his lawyer before deciding whether to take the chemical test.[311] The problem was that the

303. *Stickler*, 97 A.D.3d at 855, 948 N.Y.S.2d at 699.

304. *Id.*

305. *Id.*, 948 N.Y.S.2d at 700 (citing People v. Mojica, 62 A.D.3d 100, 108-09, 874 N.Y.S.2d 195, 202 (2d Dep't 2009), *leave denied*, 12 N.Y.3d 856, 909 N.E.2d 591, 881 N.Y.S.2d 668 (2009)).

306. *Stickler*, 97 A.D.3d at 855, 948 N.Y.S.2d at 699 (quoting *In re* Raquel M., 99 N.Y.S.2d 92, 95, 782 N.E.2d 64, 66, 752 N.Y.S.2d 268, 270 (2002)).

307. *Stickler*, 97 A.D.3d at 855, 948 N.Y.S.2d at 700 (citing *In re Raquel M.*, 99 N.Y.2d at 95, 782 N.E.2d at66, 752 N.Y.S.2d at 270).

308. *Stickler*, 97 A.D.3d at 857, 948 N.Y.S.2d at 700-01.

309. *Id.*

310. N.Y. VEH. & TRAF. LAW § 1194(2)(f) (McKinney Supp. 2013).

311. 18 N.Y.3d 544, 547, 965 N.E.2d 928, 930, 942 N.Y.S.2d 426, 428 (2012).

defendant called his lawyer, a couple of times, without success.[312] The police failed to tell the defendant, after his second attempt to reach his lawyer, that his continued persistence in awaiting a call back from his lawyer would be interpreted as a refusal to take the test, thus invoking the statutory presumption.[313]

The Court of Appeals reversed the defendant's conviction and remanded the case for a new trial, finding that there was a failure to effectively communicate to the defendant that his conduct in awaiting a return call from his attorney would be interpreted as a refusal to take the test.[314] The Court recognized that Vehicle and Traffic Law section 1194 gives rise to a "limited right to counsel," which carries with it the right to have a reasonable period of time to contact counsel by telephone.[315] However, the Court also unequivocally stated that "there is no absolute right to refuse to take the test until an attorney is actually consulted, nor can a defendant use a request for legal consultation to significantly postpone testing."[316] A request to speak with an attorney is not, in and of itself, a delaying tactic.[317] A reasonable opportunity should be presented to motorists in the defendant's position to seek the advice of counsel before agreeing to undergo or refuse the test.[318] The crucial failure here was a lack of clear communication.

C. Non-Statutory Presumptions

A common non-statutory presumption is that of mailing and receipt. The Second Department has held that a defendant's denial of receipt is insufficient to overcome the presumption of receipt where there is proof of mailing by certified mail, return receipt requested, with a signed return receipt card.[319] The Second Department has noted that "mere denial of receipt [is] insufficient to raise a triable issue of fact."[320]

Presumptions also afford substantive shortcuts to proof in the civil negligence arena. In cases where the plaintiff establishes that a moving vehicle is involved in a rear-end collision with a stopped vehicle, an

312. *Id.*

313. *Id.*

314. *Id.* at 551, 965 N.E.2d at 932-33, 942 N.Y.S.2d at 430-31.

315. *Id.* at 549, 965 N.E.2d at 931, 942 N.Y.S.2d at 429.

316. *Smith*, 18 N.Y.3d at 549, 965 N.E.2d at 931, 942 N.Y.S.2d at 429.

317. *Id.*

318. *Id.* at 549, 965 N.E.2d at 931, 942 N.Y.S.2d at 429 (citing People v. Gursey, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 353, 292 N.Y.S.2d 416, 418 (1968)).

319. Westchester Med. Ctr. v. Hereford Ins. Co., 95 A.D.3d 1306, 1307, 944 N.Y.S.2d 900, 901 (2d Dep't 2012).

320. *Id.*

inference of negligence arises against the operator of the moving vehicle, shifting the burden to that driver to provide a nonnegligent explanation for the collision.[321] Of course, this presumption derives from proof of facts supporting a statutory violation.[322] Practitioners should bear in mind that to rebut such an inference of negligence, the explanation offered must be a nonnegligent one.[323] Being drowsy, or falling asleep while driving, is not an acceptable excuse.[324] It is also not acceptable to offer an unsupported statement from the moving vehicle's operator that he took his eyes off the plaintiff's vehicle momentarily, failing to note that although it had moved forward slightly, it had not fully begun moving into the intersection controlled by the stop sign.[325]

D. Noseworthy v. City of New York

The doctrine developed by *Noseworthy v. City of New York*, where applicable, does not necessarily shift the burden of proof, but rather prescribes a general approach to assessing evidence in wrongful death cases, or in cases where the plaintiff contends that he or she has suffered a loss of memory which makes it impossible to recall the facts of the events at issue.[326] The rule allows the fact finder to apply a lesser degree of scrutiny to such party's proof at trial and affords greater latitude in inferring negligence.[327] However, the fact-finder must first determine that the plaintiff has established that they are entitled to rely upon the *Noseworthy* doctrine by clear and convincing evidence.[328] The purpose of the rule is to give the plaintiff the benefit of the doubt on issues of fact where the defendant is still available to present their version of the events, and the plaintiff is unable to do so because they are deceased or amnesiac with respect to the events.[329] Recent cases emphasize both the limitations and the requirements for the applicability of the *Noseworthy* doctrine.

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321. Grant v. Nembhard, 94 A.D.3d 1397, 1399, 943 N.Y.S.2d 272, 274-75 (3d Dep't 2012) (citing Johnson v. First Student, Inc., 54 A.D.3d 492, 492-93, 863 N.Y.S.2d 303, 304 (3d Dep't 2008)).

322. N.Y. Veh. & Traf. Law § 1192 (a) (McKinney Supp. 2013)

323. *Grant*, 94 A.D.3d at 1399, 943 N.Y.S.2d at 274-75 (citing *Johnson*, 54 A.D.3d at 492-93, 863 N.Y.S.2d at 304)).

324. *Grant*, 94 A.D.3d at 1399, 943 N.Y.S.2d at 275.

325. Giangrasso v. Callahan, 87 A.D.3d 521, 522, 928 N.Y.S.2d 68, 69 (2d Dep't 2011).

326. 298 N.Y. 76, 80, 80 N.E.2d 744, 745 (1948).

327. *Id.* at 80, 80 N.E.2d at 746.

328. *Id.*; *see also* Schechter v. Klanfer, 28 N.Y.2d 228, 233, 269 N.E.2d 812, 815, 321 N.Y.S.2d 99, 103 (1971).

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

In *Budik v. CSX Transportation, Inc.*, *Noseworthy* was held to be applicable in a wrongful death case where the plaintiff claimed that her decedent died as a result of injuries sustained when a train struck his pickup truck at a private railroad crossing.[330] The defendant train operator testified at his deposition that he was not able to see the decedent's truck in time to avoid striking it; he and his employer moved for summary judgment on this basis.[331] Summary judgment was denied, with the Third Department noting that the plaintiff's proof of the defendant's negligence was "'admittedly slight and clearly circumstantial.'"[332] In approving the application of the *Noseworthy* doctrine to the facts of that case, the court noted that the facts regarding the distance and the movement of the decedent's truck were "exclusively within the knowledge of the movants, which generally is not a proper basis for summary judgment."[333]

The *Noseworthy* doctrine is not applicable in cases where the defendant's knowledge of the facts is no greater than that of the plaintiff or the plaintiff's decedent, had they been able to testify to those facts.[334] In *Williams v. Hooper*, the Appellate Division, First Department reversed a jury verdict in favor of the plaintiff.[335] It held that the *Noseworthy* charge to the jury was not warranted because the plaintiff testified as to the facts of the underlying bus accident with some detail.[336] The plaintiff's testimony included where he was looking just prior to the accident, what part of the bus struck him, what he was doing that day, where he was going, what the weather was like, and even where on his body the bus mirror allegedly struck him.[337] The plaintiff did not establish by clear and convincing evidence that he suffered from a loss of memory that made it "'*impossible* for him to recall events at or about the time of the accident.'"[338] The court found that the plaintiff presented no evidence that his memory had been impaired so as to

330. 88 A.D.3d 1097, 1097, 931 N.Y.S.2d 176, 176 (3d Dep't 2011).

331. *Id.* at 1098, 931 N.Y.S.2d at 177.

332. *Id.* at 1098, 931 N.Y.S.2d at 177 (quoting Zwart v. Town of Wallkill, 192 A.D.2d 831, 834, 596 N.Y.S.2d 557, 559 (3d Dep't 1993)).

333. *Budik*, 88 A.D.3d at 1098, 931 N.Y.S.2d at 177 (citing Tenkate v. Moore, 274 A.D.2d 934, 935, 711 N.Y.S.2d 587, 588-89 (3d Dep't 2000)).

334. Knudsen v. Mamaroneck Post No. 90, 94 A.D.3d 1058, 1059, 942 N.Y.S.2d 800, 801 (2d Dep't 2012) (citing Zalot v. Zieba, 81 A.D.3d 935, 936, 917 N.Y.S.2d 285, 286 (2d Dep't 2011)).

335. 82 A.D.3d 448, 448, 919 N.Y.S.2d 121, 122 (1st Dep't 2011).

336. *Id.* at 450-51, 919 N.Y.S.2d at 123-24.

337. *Id.*

338. *Id.* at 451-52, 919 N.Y.S.2d at 125 (quoting Sala v. Spallone, 38 A.D.2d 860, 860, 330 N.Y.S.2d 131, 132 (2d Dep't 1972)).

render him unreliable in his testimony or that he may have been testifying incorrectly as a result of his injuries.[339]

In *Bah ex rel. Estate of Kamanom v. Benton*, the First Department addressed the interplay between the presumptions afforded in cases involving rear-end collisions and the application of the *Noseworthy* doctrine.[340] The plaintiff's decedent sustained serious head injuries when they collided with a disabled truck that was alleged to have been obstructing the highway without the requisite hazard markings, flares, or flashers.[341]

The court held that the plaintiff established that they were entitled to rely upon the *Noseworthy* doctrine and created an issue of fact through expert testimony regarding the negligence of the defendant truck driver and his employer.[342] The court also denied the defendants' motion for summary judgment, made on the grounds that the plaintiff caused an unexplained rear-end collision.[343] It determined that the defendants were not entitled to "mechanical application" of the presumption that normally applies in cases of rear-end collisions, in light of the lesser burden of proof available to the plaintiff by virtue of the *Noseworthy* doctrine.[344] The *Noseworthy* doctrine allowed the plaintiff to survive summary judgment, which he otherwise would not have been able to survive because he could not provide a nonnegligent reason why he did not see the truck or stop in time to avoid the accident.[345]

The *Noseworthy* doctrine is only applicable to those claims that rely upon facts that the decedent and/or impaired plaintiff would have been able to testify to had they been available.[346] Accordingly, in *Bah ex rel. Estate of Kamanom*, the plaintiff's claims against the defendant truck maintenance company were not entitled to the benefit of the *Noseworthy* doctrine.[347]

Even in cases where the *Noseworthy* doctrine is applicable, the plaintiff has an obligation to present "some proof from which negligence can reasonably be inferred."[348] In *Sanchez-Santiago v. Call-*

339. *Williams*, 82 A.D.3d at 452, 919 N.Y.S.2d at 125.
340. 92 A.D.3d 133, 135, 936 N.Y.S.2d 181, 182 (1st Dep't 2012).
341. *Id.* at 135, 936 N.Y.S.2d at 182-83.
342. *Id.* at 137, 936 N.Y.S.2d 184.
343. *Id.* at 138-39, 936 N.Y.S.2d at 185.
344. *Id.* at 138, 936 N.Y.S.2d at 185.
345. *See Bah ex rel. Estate of Kamanom*, 92 A.D.3d at 137, 936 N.Y.S.2d at 184.
346. *Id.*
347. *Id.*
348. Acevedo ex rel. Alvarado v. Lau, 88 A.D.3d 751, 752, 930 N.Y.S.2d 915, 915

A-Head Corp., a wrongful death lawsuit, the defendant driver moved for summary judgment and submitted proof that just prior to the collision with the plaintiff's decedent's motor vehicle, he had waited until traffic was clear, carefully completed a legal U-turn, and traveled for approximately ten seconds before being rear-ended by the decedent's motorcycle.[349]

The Second Department, reversing the denial of summary judgment below, determined that the defendants had established a prima facie entitlement to judgment because they demonstrated that they were not negligent in the accident.[350] After the burden shifted to the plaintiff to demonstrate the existence of a triable issue of fact, the plaintiff failed to submit any proof of negligence on the part of the defendant driver and the court dismissed the case.[351] There was no question as to the applicability of the *Noseworthy* doctrine, since the case involved a fatality. However, the court noted that to survive summary judgment or a directed verdict, even where the *Noseworthy* doctrine is applicable, the plaintiff must proffer evidence from which negligence may be inferred.[352] In *Sanchez-Santiago*, there were no facts from which it could be inferred that there was negligence on the part of the defendant-driver; there was no evidence of imprudent speed, inattention, or unsafe operation of the vehicle.[353] The plaintiff failed to come forward with any evidence to explain why her decedent failed to see, heed, and avoid striking the rear of the defendant's vehicle. Accordingly, the court granted the defendant summary judgment, dismissing the plaintiff's complaint.

V. EXCEPTIONS TO THE HEARSAY RULE

A. The Court of Appeals Addresses Statements Made to Medical Personnel

The Court of Appeals has issued three significant decisions regarding the admissibility of statements made to medical personnel.[354] In the first of the three decisions, *People v. Ortega,* the Court, in

(2d Dep't 2011).

349. *See* 95 A.D.3d 1292, 1292, 945 N.Y.S.2d 716, 717 (2d Dep't 2012).

350. *Id.* at 1292, 945 N.Y.S.2d at 717.

351. *Id.* at 1293, 945 N.Y.S.2d at 717.

352. *Id.*

353. *See id.*

354. *See generally* People v. Ortega, 15 N.Y.3d 610, 942 N.E.2d 210, 917 N.Y.S.2d 1 (2010); People v. Duhs, 16 N.Y.3d 405, 947 N.E.2d 617, 922 N.Y.S.2d 843 (2011); People v. Spicola, 16 N.Y.3d 441, 947 N.E.2d 620, 922 N.Y.S.2d 846 (2011).

practical effect, recognized a new exception to the hearsay rule, loosely based upon the business records exception.[355] The issue there was whether statements appearing in medical records and not presented through testimony were properly admitted at trial as relevant to diagnosis and treatment under the business records exception to the hearsay rule, C.P.L.R. 4518(a).[356] Without such an exception, entries would have been inadmissible, as they would have constituted hearsay contained within hearsay.[357] There were two underlying appeals in *People v. Ortega*.

In the first appeal discussed by the Court, *People v. Benston*, the defendant appealed his conviction of assault and other charges arising from an incident in which the defendant, who was the complainant's roommate and prior boyfriend, allegedly threatened to kill her, assaulted her, and choked her using a leather belt.[358] Upon being taken to the hospital, the complainant made statements to medical personnel that were recorded in her medical records to the effect that she had been strangled with a belt by an old boyfriend.[359] The record also contained the attending physician's diagnosis of "'domestic violence [and] asphyxiation.'"[360] The prosecution sought to introduce these medical records at trial. Defense counsel moved to redact, among other things, any references to the term "domestic violence," to the defendant's status as a "former boyfriend," to the description of the leather belt as the weapon of attempted strangulation, and to the existence of a "safety plan," which was developed as part of the medical treatment plan.[361] The lower court allowed these entries into evidence at trial.[362]

In the second appeal addressed by the Court, *Ortega*, the defendant was appealing his conviction of two counts of criminal possession of stolen property in the fourth degree.[363] The complainant's story at trial was that at approximately 4:30 in the morning, he was accosted by the defendant and other men at gunpoint.[364] The complainant further stated that they took him to a nearby building where they forced him to smoke

355. *See generally Ortega*, 15 N.Y.3d 610, 942 N.E.2d 210, 917 N.Y.S.2d 1.

356. *Id.* at 613, 942 N.E.2d at 211, 917 N.Y.S.2d at 2; *see* N.Y. C.P.L.R. 4518(a) (McKinney 2007).

357. *Ortega*, 15 N.Y.3d at 620, 942 N.E.2d at 216, 917 N.Y.S.2d at 7.

358. *Id.* at 614, 942 N.E.2d at 212, 917 N.Y.S.2d at 3.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Ortega*, 15 N.Y.3d at 614, 942 N.E.2d at 212, 917 N.Y.S.2d at 3.

363. *Id.* at 616, 942 N.E.2d at 213, 917 N.Y.S.2d at 4.

364. *Id.* at 615-16, 942 N.E.2d at 213, 917 N.Y.S.2d at 4.

crack cocaine from a glass pipe, and thereafter, forced him to provide them with his PIN numbers to his bank cards so they could make numerous withdrawals of cash from his bank accounts.[365]

In both *Benston* and *Ortega*, the defendants contended on appeal that the statements from their medical records should not have been received into evidence. Reviewing applicable law, the Court of Appeals noted that the appropriate inquiry in both cases is "whether the statements at issue were relevant to the diagnosis and treatment."[366] The Court also noted that while hospital records are properly deemed business records under C.P.L.R. 4518, the statements contained in them are not automatically admitted into evidence.[367] Entries that do not relate to diagnosis, prognosis, or treatment, including details of how a particular injury occurred are not properly part of the "business record" for purposes of the exception to the hearsay rule and should be redacted.[368]

The Court concluded in *Benston* that the trial court properly allowed into evidence the entries from the complainant's medical records of references to "an old boyfriend" as the perpetrator, the description under diagnosis of "domestic violence," as well as references to a "safety plan" for the complainant.[369] The Court reasoned that the terms "domestic violence" and the existence of a "safety plan" were relevant to diagnosis and treatment, and recognized that domestic violence implies a "whole host of other issues to confront, including psychological and trauma issues that are appropriately part of medical treatment."[370] The Court also noted that the development of a safety plan, including a referral to social services or a shelter, is properly considered an "important part of the patient's treatment."[371] On this reasoning, it was not error to admit references to domestic violence and a safety plan as contained within the complainant's medical records.[372]

The Court reached a different conclusion about the references from the medical records to a "black leather belt" being the alleged weapon.[373] While the use of a leather belt in attempted strangulation may have been relevant to diagnosis and treatment, the color of the belt

365. *Id.* at 615-16, 942 N.E.2d at 213, 917 N.Y.S.2d at 4.
366. *Id.* at 618, 942 N.E.2d at 215, 917 N.Y.S.2d at 6.
367. *Ortega*, 15 N.Y.3d at 617-18, 942 N.E.2d at 214-15, 917 N.Y.S.2d at 5-6.
368. *Id.* at 617, 942 N.E.2d at 214, 917 N.Y.S.2d at 5.
369. *Id.* at 619, 942 N.E.2d at 215, 917 N.Y.S.2d at 6.
370. *Id.*
371. *Ortega*, 15 N.Y.3d at 619, 942 N.E.2d at 215, 917 N.Y.S.2d at 6.
372. *Id.*
373. *Id.* at 619-20, 942 N.E.2d at 216, 917 N.Y.S.2d at 7.

was not relevant. References to the color of the belt should not have been admitted into evidence.[374] Such error was deemed harmless, and the Court did not reverse the conviction because the evidence against the defendant was overwhelming, with "no significant probability that, had the error not occurred, the outcome of the trial would have been different."[375]

Deciding the issue in *Ortega*, the Court addressed the statement in the medical records that the complainant was "forced to" smoke a white powdery substance, and determined that this statement was properly admitted as relevant to diagnosis and treatment.[376] The Court reasoned that this information was relevant to medical treatment because it pertained to whether the patient was "in control over either the amount or the nature of the substance he ingested," and further that treatment of a patient who voluntarily has ingested drugs would be different from a patient who had been coerced into taking drugs.[377] The defendant's conviction was affirmed.[378]

The majority decision of the Court was issued by Chief Judge Lippman.[379] Judge Smith and Judge Pigott wrote separate concurrences.[380] These concurrences are notable, as they indicate concerns over this evidentiary rule regarding admissibility of hearsay contained within medical records. Judge Smith, in his concurrence, recognized that the statements in the hospital records present a "hearsay within hearsay" issue, and their admission into evidence is not squarely supported by a business records exception.[381] He was of the mind that, rather than relying on the business records exception, the majority should have expressly recognized a hearsay exception for statements of this kind to one's own doctor or other healthcare professional.[382] In the words of Judge Smith, "[i]n other words, I think we are adopting the 'medical diagnosis and treatment' exception to the hearsay rule in this case, and I think we ought to say so."[383] The reasoning of Judge Smith approving of such an exception is that "[s]tatements to one's own doctor

374. *Id.*

375. *Id.* at 620, 942 N.E.2d at 216, 917 N.Y.S.2d at 7 (citing People v. Crimmins, 36 N.Y.2d 230, 241-42, 326 N.E.2d 787, 794, 367 N.Y.S.2d 213, 222 (1975)).

376. *Ortega*, 15 N.Y.3d at 620, 942 N.E.2d at 216, 917 N.Y.S.2d at 7.

377. *Id.*

378. *Id.*

379. *Id.* at 613, 942 N.E.2d at 211, 917 N.Y.S.2d at 2 (Lippman, J.).

380. *Id.* at 620, 942 N.E.2d at 216, 917 N.Y.S.2d at 7 (Pigott and Smith, JJ. concurring).

381. *Ortega*, 15 N.Y.3d at 620-21, 942 N.E.2d at 216, 917 N.Y.S.2d at 7.

382. *Id.* at 621, 942 N.E.2d at 217, 917 N.Y.S.2d at 8.

383. *Id.*

or other healthcare professional have an intrinsic guarantee of reliability, for only a foolish person would lie to his or her own doctor when seeking medical help."[384] In his concurrence, Judge Pigott was more circumspect and raised concerns that hearsay statements offered through medical records, particularly those that identify the alleged perpetrator or purport to explain circumstances of an injury, may implicate violations of the confrontation clause of the Sixth Amendment.[385]

Judge Pigott also expressed his opinion in deciding the *Benston* appeal: the majority interpreted the business records exception too broadly by concluding that a diagnosis of "domestic violence" and references to a "safety plan" were properly admitted as part of the victim's diagnosis and treatment.[386] He expressed his concern that "[a] blanket rule allowing statements made by the complainant at the time of admission to the hospital can be just as harmful to a complainant's interests in some cases as its application here was to the defendant."[387] He explained that it is "common knowledge" that victims of domestic violence or child abuse often mislead medical providers to protect the abusers, to cover their own victimization, and for other reasons.[388] Under his analysis, the term "domestic violence" should have been redacted because whether the complainant was strangled by a former intimate partner or by a complete stranger was truly irrelevant to the type of treatment she received for physical injuries.[389] Further, in his opinion, the formulation of a "safety plan" for the complainant's protection after she left the hospital was not pertinent to diagnosis or treatment of her "immediate injuries."[390]

With respect to the *Ortega* appeal, Judge Pigott found the victim's story—that he was forced at gunpoint to smoke crack cocaine so that the defendant could force him to turn over his ATM card—"unworthy of belief," so much so that it probably inured to the benefit of the defendant.[391] Notwithstanding this, he noted there was no medical foundation for the admissibility of the medical record entries regarding the alleged criminal activity. He noted that there was no medical testimony to support the statement at issue—that the complainant was

384. *Id.* (citing Davidson v. Cornell, 132 N.Y. 228, 237, 30 N.E. 573, 576 (1892)).
385. *Ortega*, 15 N.Y.3d at 623, 942 N.E.2d at 218, 917 N.Y.S.2d at 9.
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *Ortega*, 15 N.Y.3d at 623-24, 924 N.E.2d at 218-19, 917 N.Y.S.2d at 9-10.
391. *Id.* at 624, 924 N.E.2d at 219, 917 N.Y.S.2d at 10.

"forced" to ingest cocaine—was in any way relevant to diagnosis and treatment.[392] Therefore, it should have been excluded, as it tended to bolster complainant's testimony.[393]

In the second of the three recent Court of Appeals cases addressing the admissibility of hearsay statements made to medical personnel, *People v. Duhs*, the Court considered whether medical personnel could properly testify regarding statements made to them by their patients about causation of an incident.[394]

The defendant in *Duhs* appealed his conviction of first-degree assault and endangering the welfare of a child, arising from an incident where the defendant, while babysitting, had allegedly restrained a three-year-old child in a tub of scalding water, resulting in second- and third-degree burns.[395] Five hours after the incident, the child was examined and treated by an emergency room physician.[396] At trial, the pediatrician was allowed to testify about a statement made by the child when asked by the pediatrician why he did not get out of the tub, to which he responded, "[h]e wouldn't let me out."[397] This statement was not included in the child's medical records, nor did the child himself testify at trial.[398] The statement was offered solely through the testimony of the emergency room pediatrician.[399]

The issues before the Court were whether it was error to allow the pediatrician to testify regarding the child's statement on the grounds that it was germane to medical diagnosis and treatment and, relatedly, whether its admission violated the defendant's Sixth Amendment rights under the Confrontation Clause, as the child did not testify.[400] This was a concern raised by Judge Pigott in his concurrence in *Ortega*.[401]

In a unanimous decision authored by Judge Pigott, the Court in *Duhs* ruled that the statement by the child was properly admitted as an exception to the hearsay rule because it was germane to his medical diagnosis and treatment.[402] The Court noted that there was proper

392. *Id.* at 624, 924 N.E.2d at 291, 917 N.Y.S.2d at 10.

393. *Id.* (citing People v. Benedetto, 294 A.D.2d 958, 959, 744 N.Y.S.2d 92, 93-94 (4th Dep't 2002)).

394. 16 N.Y.3d 405, 407-08, 947 N.E.2d 617, 618, 922 N.Y.S.2d 843, 844 (2011).

395. *Id.* at 407, 947 N.E.2d at 618, 922 N.Y.S.2d at 844.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Duhs*, 16 N.Y.3d at 407, 947 N.E.2d at 618, 922 N.Y.S.2d at 844.

400. *Id.* at 407-08, 947 N.E.2d at 618, 922 N.Y.S.2d at 844.

401. *See* People v. Ortega, 15 N.Y.3d 610, 622-23, 942 N.E.2d 210, 218, 917 N.Y.S.2d 1, 9 (2010) (Pigott, J., concurring).

402. *Duhs*, 16 N.Y.3d at 408, 947 N.E.2d at 618, 922 N.Y.S.2d at 844.

testimonial foundation to support this conclusion.[403] The pediatrician testified that, during the initial assessment, she examined the child and asked the child how he had been injured in order to determine the time and mechanism of injury for proper treatment.[404] She also testified that the type of treatment was dependent upon when and how the child was injured. Ascertaining whether the child resisted being placed into the hot bath water might indicate whether the child had a predisposition or developmental delay that would have prevented him from getting out on his own.[405]

Addressing the defendant's contention that allowing the pediatrician to testify about what the child had told her violated his Sixth Amendment right to confront a witness, the Court performed an analysis of whether the child's statement to the pediatrician was testimonial or non-testimonial.[406] Non-testimonial statements do not implicate the confrontation clause, while testimonial statements do.[407] Non-testimonial statements were defined as those elicited during interrogation where the "primary purpose" was to meet an ongoing emergency.[408]

Applying the primary purpose test to the facts, the Court determined that the primary purpose of the pediatrician's inquiry was so that she could make a proper diagnosis and administer medical treatment.[409] Even if there was a secondary motive, for example, to fulfill the pediatrician's ethical and legal duty as a mandated reporter of child abuse, that was not determinative of the issue.[410]

In the third of the Court's recent decisions regarding the admissibility of hearsay statements made to medical personnel regarding causation of an incident, *People v. Spicola*, a divided Court approved of a trial court's admission into evidence the testimony of a nurse practitioner regarding statements made by a child sex abuse victim.[411] The *Spicola* criminal prosecution for sodomy, sexual abuse, and endangering the welfare of a child alleged that a number of sexual encounters that occurred when the complainant was a young boy, which were not disclosed until the boy reported the alleged sexual abuse to his

403. *Id.*, 947 N.E.2d at 618-19, 922 N.Y.S.2d at 844-45.
404. *Id.*, 947 N.E.2d at 618, 922 N.Y.S.2d at 844.
405. *Id.* at 408, 947 N.E.2d at 618-19, 922 N.Y.S.2d at 844-45.
406. *Id.* at 408-09, 947 N.E.2d at 619-20, 922 N.Y.S.2d at 845-46.
407. *Duhs*, 16 N.Y.3d at 408-09, 947 N.E.2d at 619, 922 N.Y.S.2d at 845.
408. *Id.* at 409, 947 N.E.2d at 619, 922 N.Y.S.2d at 845.
409. *Id.*, 947 N.E.2d at 619-20, 922 N.Y.S.2d at 845-46.
410. *Id.* at 410, 947 N.E.2d at 620, 922 N.Y.S.2d at 846.
411. 16 N.Y.3d 441, 448, 947 N.E.2d 620, 623, 922 N.Y.S.2d 846, 849 (2011).

mother many years later.[412] The mother contacted police, who brought the child to a child advocacy center where he was interviewed by a prosecutor and examined by a nurse practitioner who recommended counseling.[413] The jury convicted the defendant on all counts.[414]

The defendant appealed on a number of grounds, including, pertinent here, that the trial judge erred in allowing testimony from a nurse practitioner who examined the complainant, as well as permitting expert testimony from a clinical social worker related to child sexual abuse accommodation syndrome ("CSAAS").[415] Over the defendant's attorney's objections, the trial judge determined that the nurse would be permitted to testify regarding statements made to her by the boy that were germane to diagnosis and treatment, but she would not be permitted to identify the perpetrator or recount how many times the alleged sexual abuse occurred.[416] The medical record itself was not received into evidence.[417]

The nurse testified at trial that it was her practice to take a complete medical history of the child victim and perform a physical exam.[418] It was also her practice to ask a child why he or she was at the child abuse center and inquire into the child's health.[419] She testified that it was necessary for her to take a subjective history from the patient, even where suspected sexual abuse occurred a number of years earlier, because "she need[ed] to know of any problems, any lesions, any sores, any concerns."[420]

The nurse also testified that the boy indicated he had been touched inappropriately—by gesturing to his groin and indicating that "it had been put in his mouth and was asked to put somebody else's into his mouth"—and that, as he provided this information, she observed him to be "embarrassed, [with] downcast eyes, flushed face."[421] She described the physical examination she performed, which included heart rate and examination of the genital area.[422] During the exam, she observed that the boy's heart rate was elevated, indicating to her that he was

412. *Id.* at 445-46, 947 N.E.2d at 621-22, 922 N.Y.S.2d at 847-48.
413. *Id.* at 446, 947 N.E.2d at 622, 922 N.Y.S.2d at 848.
414. *Id.* at 448, 947 N.E.2d at 623, 922 N.Y.S.2d at 849.
415. *Id.* at 450, 947 N.E.2d at 623, 922 N.Y.S.2d at 849.
416. *Spicola*, 16 N.Y.3d at 449, 947 N.E.2d at 624, 922 N.Y.S.2d at 850.
417. *See id.*
418. *Id.* at 450, 947 N.E.2d at 624, 922 N.Y.S.2d at 850.
419. *Id.*
420. *Id.*
421. *Spicola*, 16 N.Y.3d at 450, 947 N.E.2d at 624-25, 922 N.Y.S.2d at 850-51.
422. *Id.*, 947 N.E.2d at 625, 922 N.Y.S.2d at 851.

"nervous" and that the genital and rectal exam was negative for sores or lesions.[423] On cross-examination, the nurse acknowledged that she had no way of knowing whether the history of sexual abuse was true or false, that it would not be unusual for a thirteen-year-old boy to show signs of nervousness when talking to a stranger about private matters, and that she found no physical evidence to support the history of abuse.[424]

The Court of Appeals approved of the admission of the nurse-practitioner's testimony regarding information obtained from the boy during her subjective medical history.[425] The Court determined that the boy's responses were germane to diagnosis and treatment and, therefore, properly admitted as an exception to the hearsay rule pursuant to the authority of *People v. Ortega*.[426] The Court also approved of the trial court's admission of testimony by the nurse regarding her observation of the boy's demeanor and manner during the physical exam, on the reasoning that they were relevant to medical decisions and the necessity for counseling or psychological therapy or other treatment.[427]

The Court noted in its analysis that the defendant's defense at trial was primarily to attack the complainant's credibility, there being no physical evidence of abuse.[428] The child complainant, then thirteen years of age, did testify at trial as to the sexual conduct.[429] Upon cross-examination, the defendant's attorney questioned the complainant, causing him to acknowledge that for six or seven years he neglected to tell his mother, his grandmother, his friends, his teachers, any doctor, indeed any person about the alleged abuse, and that he continued to visit the defendant's house after the last sexual encounter, saw him several times a week during the soccer season, and furthermore that he had not mentioned one of "the vivid details of his story to the Grand Jury."[430]

The Court concluded that the nurse's testimony "rounded out the narrative of the immediate aftermath of the boy's disclosure to his mother and, more importantly, addressed the negative inference that

423. *Id.* at 450, 947 N.E.2d at 625, 922 N.Y.S.2d at 851.

424. *Id.* at 451, 947 N.E.2d at 625, 922 N.Y.S.2d at 851.

425. *Id.* at 453, 947 N.E.2d at 626-27, 922 N.Y.S.2d at 852-53.

426. *Spicola*, 16 N.Y.3d at 451, 947 N.E.2d at 625, 922 N.Y.S. at 851 (citing People v. Ortega, 15 N.Y.3d 610, 942 N.E.2d 210, 917 N.Y.S.2d 1 (2010)).

427. *Spicola*, 16 N.Y.3d at 451-52, 947 N.E.2d at 626, 922 N.Y.S.2d at 852.

428. *Id.* at 453, 947 N.E.2d at 626, 922 N.Y.S.2d at 852.

429. *See id.* at 446-47, 947 N.E.2d at 622, 922 N.Y.S.2d at 848.

430. *Id.*

jurors might draw from the absence of medical evidence of abuse."[431] This reasoning was the Court's response to the defendant's argument that the admission of the testimony was improper bolstering.[432] The Court found that as a prior consistent statement, bolstering might be a colorable argument.[433] However, the nurse's testimony was admissible under a separate exception to the hearsay rule that allows statements to be admissible if relevant to diagnosis and treatment.[434]

Also at issue was the admissibility of expert testimony from a prosecution witness on the topic of CSAAS.[435] The witness was a clinical social worker who was prepared to offer testimony about CSAAS generally and describe a pattern of behavior, including delayed disclosures, which are "common characteristics" in children who report sexual abuse.[436] The defendant challenged the proffered expert witness by a motion in limine, arguing among other things that testimony regarding CSAAS is non-probative because it was not offered to establish or state that sexual abuse did in fact occur in this case.[437] The defendant also challenged that the concept of CSAAS did not withstand scrutiny under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* because it did not have general acceptance within the scientific community.[438] The defendant argued that the proffered testimony was not necessary because jurors already understood the basic concept that children who are sometimes abused do not report it immediately and that sometimes reporting occurs after a period of time.[439]

At trial, the expert, a licensed clinical social worker, was permitted to testify generally regarding CSAAS, but did not offer any opinions about whether the victim in that particular prosecution was a victim of child abuse.[440] The witness reiterated that the purpose of the testimony was to provide information about how children respond to being sexually abused and what is commonly seen, as well as common misconceptions regarding children and child sexual abuse.[441] The

431. *Id.* at 453, 947 N.E.2d at 626, 922 N.Y.S.2d at 852.

432. *Spicola*, 16 N.Y.3d at 453, 947 N.E.2d at 626, 922 N.Y.S.2d at 852.

433. *See id.*

434. *Id.* at 452-53, 947 N.E.2d at 626, 922 N.Y.S.2d at 852.

435. *See id.* at 453, 947 N.E.2d at 627, 922 N.Y.S.2d at 853.

436. *Id.* at 453, 947 N.E.2d at 627, 922 N.Y.S.2d at 853.

437. *Spicola*, 16 N.Y.3d at 453-54, 947 N.E.2d at 627, 922 N.Y.S.2d at 853.

438. *Id.* at 454-55, 947 N.E.2d at 628, 922 N.Y.S.2d at 854 (citing Kamala London, et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 220 (2005)).

439. *Spicola*, 16 N.Y.3d at 455, 947 N.E.2d at 628, 922 N.Y.S.2d at 854.

440. *Id.* at 456-57, 947 N.E.2d at 629, 922 N.Y.S.2d at 855.

441. *Id.* at 457, 947 N.E.2d at 629, 922 N.Y.S.2d at 855.

expert also testified that CSAAS was generally accepted as reliable within the relevant scientific community of his specialty and in many follow-up studies.[442] He described five categories of behaviors commonly associated with CSAAS, including delayed reporting.[443]

On appeal, the defendant argued the expert's testimony should not have been admitted because it bolstered the boy's credibility and tended to prove that the abuse, in fact, happened.[444] The Court began its analysis by reviewing a number of cases in which psychiatric testimony similar to CSAAS, as well as expert testimony regarding CSAAS, was admitted to explain the behavior of crime victims, including rape trauma syndrome and abused child syndrome.[445] In reviewing these decisions, the Court noted a common denominator for admissibility was that the expert was not going to offer an opinion to establish that the alleged crime occurred, but rather to provide information relevant to understanding the victim's post-trauma behavior.[446]

In approving the testimony by the expert, the Court recognized, quite candidly, that it was relevant and necessary to rehabilitate the complainant from the attack upon his credibility.[447] With respect to the scientific reliability attack, the Court noted that there was sufficient scholarship to support CSAAS, and, to the extent that there were studies questioning the validity of CSAAS, they were insufficient to overcome the Court's accepted view that CSAAS is generally accepted as reliable in the relevant scientific community.[448]

There was a strong dissent by Chief Judge Lippman.[449] He agreed with the majority that the portion of the nurse practitioner's testimony regarding the complainant's account of what happened to him, and the results of her physical examination, were properly admitted as relevant to diagnosis and treatment.[450] However, he objected to the nurse practitioner's testimony concerning the complainant's demeanor,

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442. *Id.* at 457, 947 N.E.2d at 629-30, 922 N.Y.S.2d at 855-56.

443. *Id.* at 458, 947 N.E.2d at 630, 922 N.Y.S.2d at 856.

444. *Spicola*, 16 N.Y.3d at 460, 947 N.E.2d at 631, 922 N.Y.S.2d at 857.

445. *Id.* at 460-63, 947 N.E.2d at 632-33, 922 N.Y.S.2d at 858-59 (discussing People v. Keindl, 68 N.Y.2d 410, 502 N.E.2d 577, 509 N.Y.S.2d 790 (1986); *In re* Nicole V., 71 N.Y.2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19 (1987); People v. Taylor, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990); and People v. Carroll, 95 N.Y.2d 375, 740 N.E.2d 1084, 718 N.Y.S.2d 10 (2000)).

446. *Spicola*, 16 N.Y.3d at 463, 947 N.E.2d at 633, 922 N.Y.S.2d at 859.

447. *Id.*, 947 N.E.2d at 634, 922 N.Y.S.2d at 860.

448. *Id.* at 467, 947 N.E.2d at 637, 922 N.Y.S.2d at 862.

449. *See id.* at 467-71, 947 N.E.2d at 637-39, 922 N.Y.S.2d at 863-65 (Lippman, C.J., dissenting).

450. *Id.* at 468, 947 N.E.2d at 637, 922 N.Y.S.2d at 863.

challenging that it was improper bolstering and noting that the majority admitted that it was offered for credibility purposes.[451] He also offered his opinion that the testimony was not relevant to diagnosis and treatment, and therefore its admission was error.[452]

Chief Judge Lippman also criticized the admission of expert testimony on CSAAS. In his view, the sole reason for questioning the expert witness was to bolster the testimony of the complainant.[453] While he agreed that CSAAS can be used for purposes of explaining behavior by a complainant that might appear unusual to the average juror, it was not permissible to use such testimony to offer opinions that the complainant's behavior was consistent with abuse.[454] In this case, there being no physical evidence of abuse, Chief Judge Lippman felt the admission of expert testimony to support the complainant's testimony was highly prejudicial.[455]

There have been a few post-*Ortega* cases in which courts have applied the exception to the hearsay rule for statements in medical records and statements made to medical personnel regarding causation of an incident. In *People v. Jaikaran*, the defendant was convicted of endangering the welfare of a child through alleged repeated sexual encounters with the complainant, his biological daughter, on those occasions when she traveled to the United States to meet him.[456] She had been raised in the Netherlands.[457] The Second Department reversed the conviction and remanded the matter for a new trial based upon error of the trial court in precluding the defendant's counsel, during cross-examination of the complainant, from entering into evidence certain portions of her hospital records following a suicide attempt during one of her visits to the United States.[458]

The hospital records included several statements by the complainant that were inconsistent with her testimony at trial.[459] Specifically, the statements indicated that she was not sexually active and had not been the victim of sexual abuse.[460] Citing *People v. Ortega*, the Court determined that the statements in the hospital records were

451. *Spicola*, 16 N.Y.3d at 468, 947 N.E.2d at 637, 922 N.Y.S.2d at 863.
452. *Id.* at 468-69, 947 N.E.2d at 637-38, 922 N.Y.S.2d at 863-64.
453. *Id.* at 469, 947 N.E.2d at 638, 922 N.Y.S.2d at 864.
454. *Id.* at 468-69, 947 N.E.2d at 637-38, 922 N.Y.S.2d at 863-64.
455. *Id.* at 471, 947 N.E.2d at 639, 922 N.Y.S.2d at 865.
456. 95 A.D.3d 903, 903, 943 N.Y.S.2d 223, 224 (2d Dep't 2012).
457. *Id.*
458. *Id.* at 904, 943 N.Y.S.2d at 224.
459. *Id.*
460. *Id.*

properly admissible under the business records exception to the hearsay rule.[461] Moreover, the failure to admit the records interfered with the defendant's Sixth Amendment constitutional right to conduct a cross-examination and to present a defense. The court determined that the complainant's physician-patient privilege "must yield to defendant's constitutional right of confrontation" and that the statements at issue were properly admissible as germane to diagnosis and treatment of the complainant.[462]

In *People v. Blackman*, the Third Department approved of the admissibility into evidence statements made by a sexual assault victim to medical providers while a patient in the hospital, upon proper foundation through the testimony of the treating physician that the description of how the assault occurred was relevant to medical care and treatment, notwithstanding there was a dual purpose of assisting the criminal investigation regarding the facts of the assault.[463]

In some of the cases following *Ortega*, statements made to medical providers have been denied admissibility as not relevant to medical diagnosis or treatment. Examples include statements in unsworn medical records by a plaintiff that he was injured while jumping into a pool, rather than tripping on a loose board and falling into the pool, as he contended,[464] and statements made by an assault victim to an ambulance attendant, detailing his actions after being struck by a beer bottle.[465]

Of note is that statements contained within medical records are not generally a solid basis for supporting or opposing summary judgment. To be considered by the court, records should be properly certified and in an evidentiary form admissible at trial. When a defendant relies on statements in medical records to oppose summary judgment by disputing causation of injuries, he or she must provide some foundational evidence attributing the statements to the injured plaintiff and must show that the statements were germane to medical diagnosis and treatment, which would be the basis for their admissibility at trial pursuant to the *Ortega* exception to the hearsay rule.[466]

461. *Jaikaran*, 95 A.D.3d at 904, 943 N.Y.S.2d at 225.

462. *Id.* (quoting People v. Bridgeland, 19 A.D.3d 1122, 1125, 796 N.Y.S.2d 768, 771 (4th Dep't 2005)).

463. 90 A.D.3d 1304, 1309, 935 N.Y.S.2d 181, 187 (3d Dep't 2011).

464. Sermos v. Gruppuso, 95 A.D.3d 985, 986, 344 N.Y.S.2d 245, 246 (2d Dep't 2012).

465. People v. Bahr, 96 A.D.3d 1165, 1166, 946 N.Y.S.2d 675, 677 (3d Dep't 2012).

466. *See generally Sermos*, 95 A.D.3d at 985, 344 N.Y.S.2d at 245.

B. Excited Utterance—Present Sense Impression

Proponents for the admission of 9-1-1 tapes, for proof of the statements contained on them, often argue admissibility based upon the "excited utterance" or "present sense impression" exceptions to the hearsay rule. Both of these exceptions derive from a concept formerly known as statements made within the res gestae, meaning that it is a statement made in the course of an event as it is happening or so close in time after its conclusion, as to be deemed reliable, on the reasoning that declarant had no reasonable opportunity for thought, reflection, or fabrication of the statements at issue.

The Second Department discussed this concept in *Seaberg v. North Shore Lincoln-Mercury, Inc.*, where the plaintiff appealed from a defense verdict in a parking lot slip-and-fall case.[467] During the plaintiff's case, she testified that she saw and felt ice on the ground as she fell.[468] She also called a witness, employed by the defendant on the date of the accident, who called 9-1-1 approximately two minutes after the accident.[469] Before this witness testified, however, the plaintiff's attorney sought the admission of a 9-1-1 tape of the witness' call, under the "present sense impression" or "excited utterance" exceptions to the hearsay rule.[470] The trial court ruled the tape inadmissible because the declarant did not witness the accident.[471] When the witness testified equivocally about his observations of the scene after the incident, the plaintiff's counsel sought to use the 9-1-1 tape to refresh the witness's recollection and have the tape admitted as a prior inconsistent statement.[472] The witness apparently told the 9-1-1 operator that he had seen "ice on the ground that caused [the plaintiff] to slip and fall."[473] This request was denied.[474]

The Second Department agreed that the witness' statement to the 9-1-1 operator did not fall within the excited utterance or the present sense impression exception to the hearsay rule because the declarant was not describing events as they were happening or immediately thereafter.[475] However, the court held that the trial court should have allowed the plaintiff to refresh the witness's recollection with the 9-1-1

467. 85 A.D.3d 1148, 1148, 925 N.Y.S.2d 669, 670 (2d Dep't 2011).
468. *Id.*
469. *Id.* at 1148-49, 925 N.Y.S.2d at 670.
470. *Id.* at 1149, 925 N.Y.S.2d at 670.
471. *Id.*
472. *Seaberg*, 85 A.D.3d at 1149-50, 925 N.Y.S.2d at 671.
473. *Id.* at 1149, 925 N.Y.S.2d at 670.
474. *Id.* at 1150, 925 N.Y.S.2d at 670.
475. *Id.* at 1151, 925 N.Y.S.2d at 672.

tape outside the presence of the jury.[476] Furthermore, the court held that the plaintiff did lay a proper foundation for the introduction of the 9-1-1 tape as a prior inconsistent statement and that the 9-1-1 tape should have been entered into evidence as a prior inconsistent statement, for the limited purpose of allowing the plaintiff to impeach his credibility, and not necessarily for the truth of the statements made on it.[477] The plaintiff was granted new trial on liability.[478]

In *People v. Parchment*, the Second Department ruled that the trial court erred in allowing into evidence the 9-1-1 call made by an anonymous declarant under the present sense impression to the hearsay rule.[479] The court determined that "the element of contemporaneity was not satisfied."[480] The anonymous 9-1-1 caller was noted to have described the entire course of events to the operator using the past tense, which indicated that he was describing events that had occurred in the "recent past" rather than as they were occurring.[481] Moreover, the court found that the prosecution failed to demonstrate that any delay between the conclusion of the event being reported in the beginning of the call was minimal, and "not sufficient to destroy the indicia of reliability upon which the present sense impression exception rests."[482] Such error was not harmless and the matter was remanded for a new trial.[483]

A similar result was reached by the First Department in *In re Odalis F.*, a matter involving an adjudication of juvenile delinquency.[484] The presenting agency's case relied heavily on a 9-1-1 call made by a non-testifying complainant, the appellant's older brother.[485] The complainant was adjudicated a juvenile delinquent upon such evidence.[486] The First Department determined that the 9-1-1 call was improperly admitted as an excited utterance.[487] The court reviewed two applicable principles of law regarding the admission of statements as either excited utterances or present sense impressions, and noted that under either exception, the court must scrutinize the declarant's

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476. *Id.*
477. *Seaberg*, 85 A.D.3d at 1152, 925 N.Y.S.2d at 672.
478. *Id.*
479. 92 A.D.3d 699, 669, 938 N.Y.S.2d 174, 175 (2d Dep't 2012).
480. *Id.*
481. *Id.*
482. *Id.* at 699, 938 N.Y.S.2d at 176.
483. *Id.* at 700, 938 N.Y.S.2d at 176.
484. 85 A.D.3d 441, 925 N.Y.S.2d 22 (1st Dep't 2011).
485. *Id.* at 441, 925 N.Y.S.2d at 23.
486. *Id.*
487. *Id.* at 442, 925 N.Y.S.2d at 23.

activities before making the statement at issue.[488] Here, before placing the 9-1-1 call, the complainant witness contacted his mother after the appellant allegedly threatened him with a knife, waited for her to arrive home, and asked her if he should call the police.[489] The court noted that there was no independent evidence of an alleged "startling event" that led to the purported excited utterance, aside from the statements in the 9-1-1 call.[490] Accordingly, the indicia of reliability were not present and the statements should have been excluded.[491]

An excellent example of the proper admission of a statement under the "excited utterance" exception to the hearsay rule is found in the Second Department's decision in *People v. Fields*.[492] The defendant in *Fields* appealed a second-degree murder conviction, arguing among other things, that the court erred in admitting statements made by the complainant to a police officer at a hospital under the "excited utterance" exception to the hearsay rule.[493] In a fact-based analysis, the court noted that the statements at issue were made within ten minutes after the complainant was beaten with a baseball bat and shot in the back, while he was in "great pain" and "screaming that he thought he was going to die," and just prior to slipping into unconsciousness.[494] Such statements were "'clearly the product of the declarant's exposure to a startling or upsetting event that [was] sufficiently powerful to render the observer's normal reflective processes inoperative' preventing the opportunity for deliberation and fabrication."[495]

In *People v. Rogers*, the Appellate Division, Third Department, affirmed a jury verdict convicting the defendant of crimes of manslaughter and other charges. The victim had been romantically involved with the defendant.[496] Among other issues on appeal, the defendant challenged the admissibility of certain statements attributed to the deceased victim by witnesses who testified at trial under exceptions to the hearsay rule.[497]

The statements at issue were made by the victim approximately

488. *Id.* at 441-42, 925 N.Y.S.2d at 23.

489. *In re Odalis F.*, 85 A.D.3d at 442, 925 N.Y.S.2d at 23.

490. *Id.* at 442, 925 N.Y.S.2d at 23.

491. *See id.*

492. *See generally* 89 A.D.3d 861, 932 N.Y.S.2d 185 (2d Dep't 2011).

493. *Id.* at 861, 932 N.Y.S.2d 187.

494. *Id.*

495. *Id.* at 861, 932 N.Y.S.2d at 186 (citing People v. Carroll, 95 N.Y.2d 375, 385, 740 N.E.2d 1084, 1089, 718 N.Y.S.2d 10, 15 (2000)).

496. 94 A.D.3d 1246, 1247, 942 N.Y.S.2d 260, 262 (3d Dep't 2012).

497. *Id.*

four months prior to her death.[498] At trial, the victim's roommate testified that on that day, the victim was "scared, crying, shaking and in pain in the early morning hours," reporting that she had been in an argument where the defendant "'was beating her and [ ] was choking her.'"[499] The roommate then assisted the victim, who was "sobbing and hysterical" to call her sister.[500] The victim then made statements to the sister's boyfriend.[501] The boyfriend testified at trial that the victim told him that the defendant beat her up and he had observed her injuries.[502] The Third Department determined that based upon this testimony, the statements of the victim were properly admissible as excited utterances.[503] They were made "'under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication.'"[504]

Also at issue on appeal was whether the silence of the defendant, when he would otherwise have been expected to speak, was a tacit admission.[505] The victim's sister had testified at trial that on one occasion, when her sister had an ice pack on her head, she accused the defendant of hitting her, and he left the apartment without responding.[506] The trial court allowed the sister's testimony, and the Third Department agreed, holding that the defendant's silence was a tacit admission and properly received into evidence as an exception to the hearsay rule.[507] The conviction in *Rogers* was affirmed in all respects.[508]

Excited utterances by an eight-year-old child have been found sufficiently reliable to be admissible under the excited utterance exception to the hearsay exclusionary rule. In *People v. Whitlock*, a murder case, a police officer was permitted to testify that he overheard the decedent's eight-year-old son say, "C-Low shot Daddy," a reference to the defendant by his "street" name.[509] The son did testify at the

498. *Id.* at 1248, 942 N.Y.S.2d at 263.
499. *Id.*
500. *Id.* at 1249, 942 N.Y.S.2d at 263.
501. *Rogers*, 94 A.D.3d at 1249, 942 N.Y.S.2d at 263.
502. *Id.*
503. *Id.*
504. *Id.*, 942 N.Y.S.2d at 263-64 (quoting People v. Johnson, 1 N.Y.3d 302, 306, 804 N.E.2d 402, 405, 722 N.Y.S.2d 238, 241 (2003)).
505. *Rogers*, 94 A.D.3d at 1249, 942 N.Y.S.2d at 264.
506. *Id.*
507. *Id.*
508. *Id.* at 1252, 942 N.Y.S.2d at 266.
509. 95 A.D.3d 909, 910, 943 N.Y.S.2d 227, 228 (2d Dep't 2012).

defendant's trial, and the conviction was affirmed.[510]

C. Non-Verbal Hearsay

In *People v. Parson*, the First Department unanimously affirmed a conviction of criminal possession of a weapon based, in part, upon a non-verbal body movement by a child, as testified to at trial by a caseworker.[511] She described that the child passenger in the vehicle pointed out the car window while displaying "an agitated demeanor," causing the caseworker to turn around, look out the window, and see the defendant pointing a weapon.[512] The child did not testify, nor was the child's identity disclosed during the trial.[513]

The court first determined that the child's demeanor and conduct was not a non-verbal hearsay declaration because they were not intended "to assert facts or convey information."[514] Alternatively, the court reasoned that, even if the child's behavior constituted a non-verbal declaration, it was not offered for its truth but rather for the non-hearsay purpose of "'completing the narrative and explaining' the events."[515] The court rejected the defendant's claim that the witness's testimony about the child's demeanor and behavior violated the confrontation clause, reasoning that the alleged non-verbal declaration was neither testimonial nor offered for its truth.[516] The conviction was affirmed in all respects.[517]

VI. CIRCUMSTANTIAL PROOF

A. Evidence of Habit

Not to be forgotten is the useful probative value of evidence of habit to establish a course of conduct supportive of the claim or defense being advanced. In a medical malpractice lawsuit, the Fourth Department held that the trial court properly allowed a defendant to testify concerning his habit of checking for malunion during the type of hand surgery performed on the plaintiff, and based upon such

510. *Id.*
511. 94 A.D.3d 577, 578-79, 944 N.Y.S.2d 18, 19-20 (1st Dep't 2012).
512. *Id.* at 578, 944 N.Y.S.2d at 20.
513. *Id.*
514. *Id.*
515. *Id.* at 579, 944 N.Y.S.2d at 20 (quoting People v. Valdez, 69 A.D.3d 452, 452, 893 N.Y.S.2d 527, 528 (2010)).
516. *Parson*, 94 A.D.3d at 579, 944 N.Y.S.2d at 20.
517. *Id.*

testimony, properly included a habit instruction in the jury charge.[518] The court reasoned that the defendant had testified that he had performed 3,000 hand surgeries and was "very obsessive" about checking for malunion during surgery.[519] Therefore, this testimony was sufficient to demonstrate the requisite "deliberate repetitive practice" that is the foundation for the admission of habit evidence.[520]

CONCLUSION

This concludes a review of the more notable cases from New York State courts from the past year and a half on the topic of evidence. In the future, there will likely be considerable attention to the evolving area of electronic evidence. Electronic evidence is, after all, hearsay, and its admission into evidence under the exception to the hearsay rule requires all of the usual foundational requirements related to reliability and authenticity. Many of these rules and guidelines will be and have been applied to electronic evidence. Of particular consideration is how the courts will be addressing the proper foundation for such evidence. Stored electronic information may be easily altered, amended, or deleted. This presents unique challenges and issues with respect to foundational requirements for authenticity and reliability. In some instances, an expert may be required to challenge or establish such evidence. It is safe to assume that there will be more cases in the future addressing the evolving area of electronic evidence.

518. Mancuso v. Koch, 74 A.D.3d 1736, 1738, 904 N.Y.S.2d 832, 835 (4th Dep't 2010).

519. *Id.*

520. *Id.* (quoting Halloran v. Va. Chems., 41 N.Y.2d 386, 392, 361 N.E.2d 991, 996, 393 N.Y.S.2d 341, 346 (1977)).