

## EVIDENCE

**Patricia A. Lynn-Ford, Esq.<sup>†</sup>**

### CONTENTS

INTRODUCTION .....	940
I. PRESUMPTIONS, INFERENCES, AND OTHER EVIDENTIARY	
SHORTCUTS .....	941
A. <i>Adverse Inference Charge</i> .....	941
B. <i>Res Ipsa Loquitur</i> .....	943
C. <i>Collateral Estoppel</i> .....	945
D. <i>Presumption of Revocation of a Will</i> .....	948
E. <i>Proof of Mailing</i> .....	950
F. <i>Statutory Presumptions</i> .....	952
G. <i>Jury Charge as to Defendant’s “Special Skills” in a             Product Liability Lawsuit</i> .....	955
II. EXPERTS.....	958
A. <i>Expert Testimony Regarding Ethnicity-Based Statistics</i> ....	958
B. <i>Boundaries on the Scope of Police Expert Testimony</i> .....	960
C. <i>An Engineer Is Not Automatically Qualified as an         Expert in All Cases</i> .....	962
III. EXCEPTIONS TO THE HEARSAY RULE.....	963
A. <i>Facebook Page as a Party Admission</i> .....	963
B. <i>Prompt Outcry Not Previously Disclosed</i> .....	965
C. <i>Selective Silence as an Admission</i> .....	967
D. <i>Use of Hearsay for Another Purpose</i> .....	970
1. <i>To Provide Background for a Police Investigation</i> .....	970
2. <i>To Explain Child Sex Abuse Victim Behavior</i> .....	972
E. <i>Hospital Record Entries</i> .....	977
CONCLUSION.....	978

---

<sup>†</sup> Patricia A. Lynn-Ford, Esq., Partner in the Lynn Law Firm, L.L.P. in Syracuse, New York, has been representing injured persons and their families in courts throughout New York State for over twenty-five years. The author has an active trial and appellate practice, which also includes representation of individuals and businesses in commercial claims. She is a Fellow of the American College of Trial Lawyers and a member of the New York Super Lawyers Registry. She has lectured extensively on civil trial practice and evidence as part of continuing legal education programs. She and her firm welcome questions and referrals at [pford@lynnlaw.com](mailto:pford@lynnlaw.com). The author would like to express gratitude to the staff of the *Syracuse Law Review* for their diligence and assistance, as well as Martin A. Lynn, Esq., Partner in the Lynn Law Firm, whose assistance and input was invaluable.

## INTRODUCTION

This year's *Survey* will cover primarily Court of Appeals decisions, as well as a selection of decisions from other New York courts on evidentiary issues.<sup>1</sup> During the past year, the Court of Appeals, as well as the Second Circuit, addressed evidentiary implications of electronic technologies, such as electronic recording of custodial interrogations,<sup>2</sup> and foundational requirements for the admissibility of information extracted from social media "home" pages.<sup>3</sup> The Court also decided cases with issues regarding the permissible scope of expert testimony of a police or government witness,<sup>4</sup> and the admissibility of hearsay when offered not for its truth, but to explain the course of a police investigation<sup>5</sup> or to explain a victim's behavior in a child sex abuse prosecution.<sup>6</sup> There was also a decision as to whether selective silence during questioning in the course of a custodial interrogation is admissible at the criminal trial against a non-testifying defendant.<sup>7</sup> Also included is a thought-provoking decision from federal court Judge Jack Weinstein regarding the admissibility and constitutionality of ethnicity-based statistics relied on by experts testifying in negligence cases as part of the damages analysis and computation process.<sup>8</sup> These cases, as well as those addressing presumptions, inferences, and jury instructions, are discussed below.

---

1. The *Survey* year covered in this Article is from July 1, 2014, through April 30, 2015, with exceptions where noted.

2. *People v. Durant*, 26 N.Y.3d 341, 343–44, 44 N.E.3d 173, 175, 23 N.Y.S.3d 98, 100 (2015).

3. *United States v. Vayner*, 769 F.3d 125, 127 (2d Cir. 2014).

4. *People v. Inoa*, 25 N.Y.3d 466, 477, 34 N.E.3d 839, 847, 13 N.Y.S.3d 329, 337 (2015).

5. *People v. Garcia*, 25 N.Y.3d 77, 80–81, 30 N.E.3d 137, 139, 7 N.Y.S.3d 246, 248 (2015).

6. *People v. Cullen*, 24 N.Y.3d 1014, 1015, 21 N.E.3d 1009, 1010–11, 997 N.Y.S.2d 348, 349–50 (2014); *People v. Ludwig*, 24 N.Y.3d 221, 223, 21 N.E.3d 1012, 1013, 997 N.Y.S.2d 351, 352 (2014).

7. *People v. Williams*, 25 N.Y.3d 185, 188, 31 N.E.3d 103, 104, 8 N.Y.S.3d 641, 642 (2015).

8. *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 158 (E.D.N.Y. 2015).

## I. PRESUMPTIONS, INFERENCES, AND OTHER EVIDENTIARY SHORTCUTS

*A. Adverse Inference Charge*

The adverse inference jury instruction is a powerful evidentiary tool, available in both civil<sup>9</sup> and criminal<sup>10</sup> cases. The charge is often requested where an adversary fails to produce evidence prior to or at the time of trial that would have been expected to be favorable to that party's position. If given, the charge instructs the jury that they may draw an unfavorable inference against the non-producing party that the missing evidence was not supportive of the party's claim or defense. By implication, counsel may argue in summation that such evidence was intentionally withheld from jury consideration by the adverse party because it was adverse to its position at trial.

In *People v. Durant*, the Court of Appeals addressed whether a criminal defendant was entitled to an adverse inference charge because the police did not record his custodial interrogation.<sup>11</sup> The defendant had been charged with a single count of robbery in the second degree.<sup>12</sup> Prior to arrest, he was interrogated at a police station that did not have audio or video recording equipment.<sup>13</sup> Defense counsel requested the adverse inference charge to address the lack of recording of the custodial interrogation.<sup>14</sup> The request was denied by the trial court, who permitted defense counsel to make arguments during summation regarding the fact that the interrogation had not been recorded.<sup>15</sup> The defendant was convicted.<sup>16</sup> The ruling of the trial court on the adverse inference instruction, as well as the conviction, was unanimously affirmed by the Appellate Division, Fourth Department.<sup>17</sup>

The Court of Appeals granted the defendant leave to appeal on the adverse inference issue, and affirmed the conviction and ruling of the courts below.<sup>18</sup> Writing for the majority, Judge Abdus-Salaam made the following prefatory statement: “[t]he increasing availability of

---

9. 1A DAVID DEMAREST ET AL., NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL 1:75 (3d ed. 2016).

10. N.Y. PATTERN JURY INSTRUCTIONS—CRIMINAL 8.55 (2015).

11. *People v. Durant (Durant II)*, 26 N.Y.3d 341, 343–44, 44 N.E.3d 173, 175, 23 N.Y.S.3d 98, 100 (2015).

12. *Id.* at 346, 44 N.E.3d at 177, 23 N.Y.S.3d at 102.

13. *Id.* at 345, 44 N.E.3d at 176, 23 N.Y.S.3d at 101.

14. *Id.*

15. *Id.* at 346, 44 N.E.3d at 177, 23 N.Y.S.3d at 102.

16. *Durant II*, 26 N.Y.3d at 346, 44 N.E.3d at 177, 23 N.Y.S.3d at 102.

17. *People v. Durant (Durant I)*, 112 A.D.3d 1366, 1367, 977 N.Y.S.2d 535, 536 (4th Dep't 2013).

18. *Durant II*, 26 N.Y.3d at 346, 44 N.E.3d at 177, 23 N.Y.S.3d at 102.

electronic recording technology raises many complex questions of law and policy in the realm of criminal justice, most of which we cannot and do not resolve in this case.”<sup>19</sup> The Court noted that neither statute nor case law requires the video or audio recording of an interrogation; therefore, there is no legal duty breached by the failure to make such a recording.<sup>20</sup> The adverse inference charge generally applies to evidence in existence that has been destroyed, lost, or otherwise not produced to an adverse party.<sup>21</sup> It is not applicable to an alleged duty to create a particular piece of evidence.<sup>22</sup>

The Court declined to judicially mandate the recording of custodial interrogations.<sup>23</sup> Following a discussion of precedent in adverse inference and missing evidence cases, as well as a discussion of the “relatively new frontier” of the use of electronic recording of interrogations in the criminal justice system, the Court made specific reference to pending legislation and an overt referral of the issue to the legislature to address the issues involved.<sup>24</sup> The Court recognized the inherent value of electronic recording of a custodial interrogation, in that it

yields a reliable, objective record of the police’s interview with a defendant, the recording ensures that the jury at the defendant’s trial may evaluate every aspect of the defendant’s demeanor, his or her statement and his or her treatment at the hands of the police, thereby enabling the jury to make a fully informed determination of the voluntariness and meaning of the defendant’s statement,

and the voluntariness of the statements made.<sup>25</sup> The Court also made note of the value of such recordings to “reveal circumstances that may have prompted suspects to make false confessions.”<sup>26</sup>

In his concurrence, Chief Judge Lippman noted that high courts in other states, facing “legislative inaction,” fashioned their own remedies to address a lack of recording of custodial interrogations.<sup>27</sup> He

---

19. *Id.* at 343, 44 N.E.3d at 175, 23 N.Y.S.3d at 100.

20. *Id.* at 348–49, 44 N.E.3d at 178–79, 23 N.Y.S.3d at 103–04.

21. *Id.* at 349–50, 44 N.E.3d at 179, 23 N.Y.S.3d at 104 (citing *People v. Handy*, 20 N.Y.3d 663, 666, 669–70, 988 N.E.2d 879, 880, 882–83, 966 N.Y.S.2d 351, 352, 354–55 (2013)).

22. *Id.* at 350, 44 N.E.3d at 179–80, 23 N.Y.S.3d at 104–05.

23. *Durant II*, 26 N.Y.3d at 353, 44 N.E.3d at 182, 23 N.Y.S.3d at 107.

24. *Id.*

25. *Id.* at 353–54, 44 N.E.3d at 182, 23 N.Y.S.3d at 107.

26. *Id.* at 354, 44 N.E.3d at 182, 23 N.Y.S.3d at 107.

27. *Id.* at 356, 44 N.E.3d at 184, 23 N.Y.S.3d at 109 (Lippman, C.J., concurring).

concurrent “with the majority that the trial court did not abuse its discretion as a matter of law by denying the defendant’s request for an adverse inference instruction,” because there is no duty or obligation to provide such instructions in cases where a recording was not made.<sup>28</sup> He concluded his concurrence with the observation that electronic recording as a “best practice” should be “universal in the interest of a fair and impartial justice system.”<sup>29</sup>

### *B. Res Ipsa Loquitur*

The doctrine of *res ipsa loquitur* is an evidentiary rule that permits an inference of negligence in a circumstantial evidence case upon certain conditions being met. In *Barney-Yeboah v. Metro-North Commuter Railroad*, the Court of Appeals revisited the issue of when, in the context of a summary judgment motion, a plaintiff’s circumstantial proof of negligence is sufficient to warrant judgment as a matter of law on a *res ipsa* theory.<sup>30</sup>

The issue was last addressed by the Court in *Morejon v. Rais Construction Co.*, where the question was whether summary judgment in favor of a plaintiff on a *res ipsa* claim may ever be properly granted.<sup>31</sup> There, the Court held that such relief “should be a rare event,” and only “in the exceptional case in which no facts are left for determination.”<sup>32</sup> The Court also clarified that *res ipsa loquitur* is not a presumption, but rather, an inference drawn from circumstantial evidence of an occurrence that does not normally happen in the absence of negligence.<sup>33</sup>

In *Barney-Yeboah*, the Court was asked to address whether that was one of the “exceptional cases” where summary judgment was proper.<sup>34</sup> The issue was framed by the Appellate Division, First Department, when it reversed the denial of summary judgment below and granted summary judgment in favor of the plaintiff, upon proof that the plaintiff-passenger on defendant’s train “was allegedly injured when

---

28. *Durant II*, 26 N.Y.3d at 355, 44 N.E.3d at 183, 23 N.Y.S.3d at 108.

29. *Id.* at 357, 44 N.E.3d at 184, 23 N.Y.S.3d at 109.

30. (*Barney-Yeboah II*), 25 N.Y.3d 945, 946, 29 N.E.3d 896, 896, 6 N.Y.S.3d 549, 549 (2015) (citing *Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 209, 851 N.E.2d 1143, 1147, 818 N.Y.S.2d 792, 796 (2006)).

31. 7 N.Y.3d at 206, 851 N.E.2d at 1144, 818 N.Y.S.2d at 793.

32. *Id.* at 206, 212, 851 N.E.2d at 1144, 1149, 818 N.Y.S.2d at 793, 798.

33. *Id.* at 211, 851 N.E.2d at 1148, 818 N.Y.S.2d at 797.

34. *Barney-Yeboah II*, 25 N.Y.3d at 946, 29 N.E.3d at 896, 6 N.Y.S.3d at 549.

a ceiling panel in the train car swung open and struck her in the head.”<sup>35</sup> The First Department began its analysis by referencing *Morejon*, and specifically the language of the Court of Appeals that summary judgment is “rarely granted” but nonetheless appropriate in “exceptional case[s]”, where circumstantial evidence of negligence is strong, and defendant’s evidence in opposition is weak.<sup>36</sup>

Applying this standard, the First Department determined that this was one of the “exceptional cases,” and held that as a matter of law, the requisite elements of a *res ipsa* case had been satisfied.<sup>37</sup> The court noted that the record contained the requisite proof of exclusive control by the defendant, that the plaintiff did not contribute to the occurrence, and that the accident was one that would not occur in the absence of negligence.<sup>38</sup> However, the dissent pointed out that in the case of a common carrier, as was the case here, the riding public often has access to the instrumentality of injury and therefore, it cannot be concluded as a matter of law, that the defendant had exclusive control.<sup>39</sup> Although there was no proof that any member of the riding public or anyone else accessed the handle in question, the dissent found that the plaintiff’s proof failed to exclude such a possibility, as required by the Court of Appeals case *Dermatossian v. New York City Transit Authority*.<sup>40</sup>

The fact that the plaintiff was injured on a common carrier was determinative.<sup>41</sup> In a brief memorandum decision, the Court of Appeals held that the order of the appellate division should be reversed and the certified question answered in the negative, noting “[t]his is not the type of rare case in which the circumstantial proof presented by plaintiff ‘is so convincing and the defendant’s response so weak that the inference of defendant’s negligence is inescapable.’”<sup>42</sup> Following *Barney-Yeboah*, a plaintiff intent on seeking summary judgment on a *res ipsa* theory

---

35. *Barney-Yeboah v. Metro-N. Commuter R.R.*, 120 A.D.3d 1023, 1023–24, 992 N.Y.S.2d 215, 216 (1st Dep’t 2014) (hereinafter “*Barney-Yeboah I*”), *rev’d*, *Barney-Yeboah II*, 25 N.Y.3d at 946, 29 N.E.3d at 896, 6 N.Y.S.3d at 549.

36. *Id.* at 1024, 992 N.Y.S.2d at 216 (alteration in original) (quoting *Morejon*, 7 N.Y.3d at 209–12, 851 N.E.2d at 1147–49, 818 N.Y.S.2d at 796–98).

37. *Id.* at 1024, 992 N.Y.S.2d at 217.

38. *Id.*

39. *Id.* at 1026, 992 N.Y.S.2d at 219 (DeGrasse, J., dissenting).

40. *Barney-Yeboah I*, 120 A.D.3d at 1026, 992 N.Y.S.2d at 218 (DeGrasse, J., dissenting) (quoting *Dermatossian v. N.Y.C. Transit Auth.*, 67 N.Y.2d 219, 226, 492 N.E.2d 1200, 1204, 501 N.Y.S.2d 784, 788 (1986)).

41. *Id.* at 1026, 992 N.Y.S.2d at 219 (DeGrasse, J., dissenting).

42. *Barney-Yeboah II*, 25 N.Y.3d 945, 946, 29 N.E.3d 896, 896, 6 N.Y.S.3d 549, 549 (2015) (quoting *Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 209, 851 N.E.2d 1143, 1147, 818 N.Y.S.2d 792, 796 (2006)).

must be prepared not only to satisfy the elements for a *res ipsa* claim, but also to exclude all possibility that there were other actors with access to the instrumentality that caused the accident.

### C. Collateral Estoppel

In civil lawsuits, collateral estoppel, also known as issue preclusion, is an evidentiary shortcut that bars litigation of previously determined issues. For the doctrine to apply, the proponent must make a showing of: identity of issues in the present litigation and the prior determination; a full and fair opportunity to litigate the issue in the prior matter; and that the issue was determined with finality in the prior proceeding.<sup>43</sup> In the criminal context, the doctrine typically bars re-litigation of issues resolved in a defendant's favor at an earlier trial.<sup>44</sup>

In *People v. Ortiz*, the Court of Appeals addressed circumstances in a criminal case where a defendant would not be entitled to collateral estoppel of facts underlying charges of which he had previously been acquitted.<sup>45</sup> The prosecution in *Ortiz* involved multiple charges in connection with a burglary, of which the defendant was convicted of a single charge of burglary in the second degree, and acquitted of burglary in the first degree and robbery in the first degree.<sup>46</sup> His conviction was reversed by the Appellate Division, First Department, and a new trial was ordered.<sup>47</sup> The defendant's second trial was on the sole charge of burglary in the second degree.<sup>48</sup>

The facts presented by the prosecution at the re-trial were that the defendant approached a man and his girlfriend while entering their apartment and held a razor blade to the neck of the girlfriend, pushing them both through the door.<sup>49</sup> He threatened to cut the woman's throat if

---

43. See *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455–56, 482 N.E.2d 63, 67, 492 N.Y.S.2d 584, 588 (1985) (citing *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 501, 467 N.E.2d 487, 491, 478 N.Y.S.2d 823, 827 (1984)); *Ryan*, 62 N.Y.2d at 501, 467 N.E.2d at 491, 478 N.Y.S.2d at 827 (citing *Schwartz v. Pub. Adm'r*, 24 N.Y.2d 65, 70, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 959 (1969)).

44. *People v. Acevedo*, 69 N.Y.2d 478, 484–85, 508 N.E.2d 665, 669, 515 N.Y.S.2d 753, 758 (1987) (citing *People v. Goodman*, 69 N.Y.2d 32, 37–38, 503 N.E.2d 996, 1000, 511 N.Y.S.2d 565, 569 (1986)); *People v. O'Toole*, 22 N.Y.3d 335, 336, 3 N.E.3d 687, 688, 980 N.Y.S.2d 350, 351 (2013).

45. (*Ortiz III*), 26 N.Y.3d 430, 433, 44 N.E.3d 924, 925, 23 N.Y.S.3d 626, 627 (2015) (hereinafter "*Ortiz III*").

46. *Id.* at 434, 44 N.E.3d at 926, 23 N.Y.S.3d at 628.

47. *People v. Ortiz (Ortiz I)*, 69 A.D.3d 490, 490, 894 N.Y.S.2d 37, 38 (1st Dep't 2010).

48. *Ortiz III*, 26 N.Y.3d at 434, 44 N.E.3d at 926, 23 N.Y.S.3d at 628.

49. *Id.* at 433, 44 N.E.3d at 925, 23 N.Y.S.3d at 627.

the man did not comply with his demand for money or jewelry.<sup>50</sup> The man struck the defendant in the head, causing him to drop the razor blade and allowing the woman to run free.<sup>51</sup> The man and the defendant then struggled, and the man and another occupant of the apartment restrained the defendant on a bed and the girlfriend called 911.<sup>52</sup> The girlfriend reported to the 911 operator “that someone had broken in and” her boyfriend “had cornered the intruder with a kitchen knife.”<sup>53</sup>

The defendant’s version at trial was that he and a female friend had gone to the apartment building looking for a room to rent.<sup>54</sup> They stopped at the apartment to ask for the superintendent, and the two men started an argument that escalated to a fight.<sup>55</sup> During the struggle, the defendant claimed that the male pulled the defendant into the apartment and lunged at him with a kitchen knife.<sup>56</sup> The defendant also claimed that he was unarmed.<sup>57</sup>

Because the defendant had been acquitted of charges related to the use of a weapon, the defendant’s attorney moved to preclude the prosecution from presenting evidence that the defendant had threatened his victims with a razor blade.<sup>58</sup> The trial court denied the request, as well as the subsequent motion for a mistrial.<sup>59</sup> Defense counsel moved for a mistrial because the prosecution had cross-examined the defendant with evidence regarding statements she made and attributed to the defendant at pretrial proceedings.<sup>60</sup> She contended that such testimony required her to withdraw as counsel and testify as a witness for her client.<sup>61</sup> It appears that she misspoke at the arraignment, referring to a conversation in which the defendant told her the male victim came after him with a razor blade, rather than a knife.<sup>62</sup> The prosecution had sought to confront the defendant with this purported statement made by his attorney, to discredit his version at trial that the male had come after him with a knife.<sup>63</sup> The defendant’s conviction was affirmed by the

---

50. *Id.*

51. *Id.*

52. *Id.* at 433, 44 N.E.3d at 925–26, 23 N.Y.S.3d at 627–28.

53. *Ortiz III*, 26 N.Y.3d at 433, 44 N.E.3d at 926, 23 N.Y.S.3d at 628.

54. *Id.*

55. *Id.* at 433–34, 44 N.E.3d at 926, 23 N.Y.S.3d at 628.

56. *Id.* at 434, 44 N.E.3d at 926, 23 N.Y.S.3d at 628.

57. *Id.*

58. *Ortiz III*, 26 N.Y.3d at 434, 44 N.E.3d at 926, 23 N.Y.S.3d at 628.

59. *Id.* at 434–35, 44 N.E.3d at 926–27, 23 N.Y.S.3d at 628–29.

60. *Id.* at 434–35, 44 N.E.3d at 926, 23 N.Y.S.3d at 628.

61. *Id.* at 435, 44 N.E.3d at 926–27, 23 N.Y.S.3d at 628–29.

62. *Id.* at 434–35, 44 N.E.3d at 926, 23 N.Y.S.3d at 628.

63. *Ortiz III*, 26 N.Y.3d at 434, 44 N.E.3d at 926, 23 N.Y.S.3d at 628.



2016]

**Evidence**

947

Appellate Division, First Department.<sup>64</sup>

On appeal to the Court of Appeals, the Court recognized the conundrum that would be created by strict application of collateral estoppel, which would prevent any reference to the defendant's use of a razor blade in the underlying crime.<sup>65</sup> The decision by Judge Pigott addressed two issues: first, the applicability of collateral estoppel as it pertained to reference to the razor blade at the second trial, and, second, whether the advocate-witness rule required a mistrial.<sup>66</sup> The Court noted that testimony regarding the defendant's use of a razor blade was an important factual detail, and, without it, the testimony of the victims would be contorted and impede "the jury's truth-seeking function."<sup>67</sup> The Court noted that a jury would be left to wonder how the defendant overpowered the man and the woman and gained access to the apartment without the use of a weapon.<sup>68</sup> Accordingly, the Court determined that the appellate division correctly held that collateral estoppel was not applicable.<sup>69</sup>

However, the Court reversed on the grounds that the trial court should have granted defense counsel's motion to withdraw as counsel and for a mistrial, based upon the advocate-witness rule.<sup>70</sup> This rule, derived from the rules governing professional conduct, requires that a lawyer withdraw from representation when it appears that she must testify on behalf of her client.<sup>71</sup> The Court found that defense counsel had no choice but to withdraw from her representation, as she was required to testify on behalf of her client in order to rehabilitate his credibility after he was confronted with her statement at time of arraignment.<sup>72</sup>

---

64. *People v. Ortiz (Ortiz II)*, 114 A.D.3d 430, 430, 980 N.Y.S.2d 43, 44 (1st Dep't 2014), *aff'd in part, rev'd in part, Ortiz III*, 26 N.Y.3d at 433, 44 N.E.3d at 925, 23 N.Y.S.3d at 627.

65. *Ortiz III*, 26 N.Y.3d at 437, 44 N.E.3d at 928, 23 N.Y.S.3d at 630 (quoting *People v. Berkowitz*, 50 N.Y.2d 333, 344, 406 N.E.2d 783, 789, 428 N.Y.S.2d 927, 933 (1980)).

66. *Id.* at 433, 44 N.E.3d at 925, 23 N.Y.S.3d at 627.

67. *Id.* at 437, 44 N.E.3d at 928, 23 N.Y.S.3d at 630 (quoting *People v. O'Toole*, 22 N.Y.3d 335, 339, 3 N.E.3d 687, 690, 980 N.Y.S.2d 350, 353 (2013)).

68. *Id.*

69. *Id.*

70. *Ortiz III*, 26 N.Y.3d at 439, 44 N.E.3d at 929–30, 23 N.Y.S.3d at 631–32.

71. *Id.* at 437–38, 44 N.E.3d at 929, 23 N.Y.S.3d at 631 (citing N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0, r. 3.7(a) (2012)).

72. *Id.* at 438–39, 44 N.E.3d at 929, 23 N.Y.S.3d at 631.

*D. Presumption of Revocation of a Will*

A will may be revoked by the testator's actions in making a new will or codicil that expressly revokes all existing wills, or by the testator's actions in intentionally destroying an existing will.<sup>73</sup> The intentional destruction of a will effects a revocation, even if all duplicates have not been destroyed.<sup>74</sup> A presumption of revocation by destruction arises when a testator dies without a will being found among his or her personal effects.<sup>75</sup>

In *In re Estate of Lewis*, the Court of Appeals addressed the effect of the presumption of destruction in a case where no will was found in the decedent's belongings, but her former father-in-law sought probate of a copy of a will executed years earlier and prior to the divorce.<sup>76</sup> The decedent's former father-in-law was named alternate executor and beneficiary under a will executed in Texas while the couple was still married.<sup>77</sup> The decedent died fourteen years after the execution of the Texas will.<sup>78</sup> A search of the decedent's home in New York State failed to turn up a will of any kind.<sup>79</sup> The decedent's former husband was disqualified from taking under the will, pursuant to his divorce, but his father-in-law was not so disqualified.<sup>80</sup> The decedent's family objected to probate, which primarily concerned a piece of property in Clayton, New York, that had been in the decedent's family for generations.<sup>81</sup>

During probate proceedings, the objectants introduced testimony from a friend of the decedent that four years prior to her death, the decedent had shown her a new will with language stating she revoked all prior wills and codicils.<sup>82</sup> This will could not be located, nor was this friend an attesting witness to the will and available to testify regarding its due execution.<sup>83</sup>

In a four to one decision, the Appellate Division, Fourth

---

73. N.Y. EST. POWERS & TRUSTS LAW § 3-4.1(a) (McKinney 2012).

74. *Crossman v. Crossman*, 95 N.Y. 145, 152 (1884).

75. *In re Will of Fox*, 9 N.Y.2d 400, 407, 174 N.E.2d 499, 504, 214 N.Y.S.2d 405, 411 (1961) (quoting *Collyer v. Collyer*, 110 N.Y. 481, 486, 18 N.E. 110, 112 (1888)).

76. (*Lewis II*), 25 N.Y.3d 456, 459, 34 N.E.3d 833, 835, 13 N.Y.S.3d 323, 325 (2015).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (citing N.Y. EST. POWERS & TRUSTS LAW § 5-1.4(a)(1)(3) (McKinney Supp. 2016)).

81. *Lewis II*, 25 N.Y.3d at 459, 34 N.E.3d at 835, 13 N.Y.S.3d at 325.

82. *Id.* at 460, 34 N.E.3d at 836, 13 N.Y.S.3d at 326.

83. *Id.* at 460–61, 34 N.E.3d at 836, 13 N.Y.S.3d at 326.

2016]

**Evidence**

949

Department, upheld the decree of the surrogate's court dismissing objections to the petition for probate and admitting to probate the will that was executed in Texas in 1996.<sup>84</sup> Justice Peradotto dissented, finding clear evidence that the decedent intended to revoke the Texas will of 1996, both by executing a subsequent will, as testified to by her friend, as well as the presumption of physical destruction arising from the fact that the will could not be located among her personal possessions at time of death.<sup>85</sup>

On appeal, the Court of Appeals held that the lower court properly determined that because the alleged subsequently executed will was not proven, it did not effectively revoke the lost will.<sup>86</sup> However, the Court agreed with the appellate division dissent that the presumption of destruction was triggered by the fact that a will could not be located in the decedent's home following her death.<sup>87</sup> The Court further noted that this presumption had not been rebutted by the proponents of the Texas will, as "[n]one of the other duplicate wills was produced or otherwise accounted for."<sup>88</sup>

The Court remanded the matter to surrogate's court for further proceedings, noting that "[w]e are left then with a will admitted to probate upon a record sufficient only to disprove it."<sup>89</sup> The Court noted that the Texas will had been executed in quadruplicate, one original and three copies, intended to be stored at four separate locations: the couple's Texas home, the New York home, a safe deposit box, and the ex-husband's parents' home.<sup>90</sup> In this case, the duplicates were not submitted to the surrogate for consideration, which, had they been, would not have been for the purposes of admitting the duplicates to probate, but rather, as further evidence that the will that had been in the decedent's possession might properly be deemed revoked by destruction.<sup>91</sup>

On the record before the Court, there was some evidence of will

---

84. *In re Estate of Lewis (Lewis I)*, 114 A.D.3d 203, 206–07, 978 N.Y.S.2d 527, 529 (4th Dep't 2014), *aff'd in part, modified in part, Lewis II*, 25 N.Y.3d at 463, 34 N.E.3d at 838, 13 N.Y.S.3d at 328.

85. *Id.* at 214–15, 978 N.Y.S.2d at 535 (Peradotto, J., dissenting).

86. *Lewis II*, 25 N.Y.3d at 461, 34 N.E.3d at 836, 13 N.Y.S.3d at 326 (citing N.Y. EST. POWERS & TRUSTS LAW § 3-4.1(a)(1)(B) (McKinney 2012)).

87. *Id.* at 462, 34 N.E.3d at 837, 13 N.Y.S.3d at 327.

88. *Id.*

89. *Id.* at 462–63, 34 N.E.3d at 837–38, 13 N.Y.S.3d at 327–28.

90. *Id.* at 460, 34 N.E.3d at 835–36, 13 N.Y.S.3d at 325–26.

91. *Lewis II*, 25 N.Y.3d at 462–63, 34 N.E.3d at 837–38, 13 N.Y.S.3d at 327–28 (quoting *Crossman v. Crossman*, 95 N.Y. 145, 152 (1884)).

duplicates and a lost will.<sup>92</sup> Such evidence supported a denial of probate, which the Court considered may have deprived the petitioner “of a fair opportunity to avoid or rebut the presumption of revocation which otherwise must control the outcome of this proceeding.”<sup>93</sup> A concurrence by Judge Pigott cautioned that the Court’s language to the effect that the presumption had not been rebutted by the proponents should be treated as non-binding dicta by the surrogate’s court on remanded proceedings.<sup>94</sup>

#### *E. Proof of Mailing*

In *Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co.*, the Court addressed the question of what proof was required by a plaintiff medical provider on a motion for summary judgment in an action seeking payment of overdue no-fault benefits from a defendant insurer.<sup>95</sup> In such a case, the medical provider typically demonstrates prima facie entitlement to summary judgment with evidence that payment of no-fault benefits are overdue, along with proof of its claim, the statutory billing form, proof of mailing, and receipt by the defendant insurer.<sup>96</sup>

In moving for summary judgment, the plaintiff medical provider in *Viviane Etienne Medical Care* presented proof that medical bills were submitted to the defendant insurer on a timely basis and were not paid within the thirty-day time period specified by the No-Fault Insurance Law.<sup>97</sup> Complicating the proof a bit was the fact that the plaintiff medical provider had hired a third-party billing service to collect payment.<sup>98</sup> The plaintiff submitted an affidavit from the president of the billing company in which he attested to personal knowledge of his company’s procedures. He related that the medical provider would first submit an assignment of benefits, signed by the injured party, and thereafter, the company receives bills from the medical provider, processes them into its computer system, and completes statutory billing forms. The forms are then mailed to the defendant insurance carrier.<sup>99</sup> In this case, the president averred that the completed claims were logged

---

92. *Id.* at 460–61, 34 N.E.3d at 835–36, 13 N.Y.S. at 325–26.

93. *Id.* at 463, 34 N.E.3d at 838, 13 N.Y.S.3d at 328.

94. *Id.* (Pigott, J., concurring).

95. 25 N.Y.3d 498, 501, 35 N.E.3d 451, 454, 14 N.Y.S.3d 283, 286 (2015).

96. *Id.*

97. *Id.* at 502, 35 N.E.3d at 454–55, 14 N.Y.S.3d at 286–87.

98. *Id.* at 502, 35 N.E.3d at 455, 14 N.Y.S.3d at 287.

99. *Id.* at 502–03, 35 N.E.3d at 455, 14 N.Y.S.3d at 287.

2016]

**Evidence**

951

into a mailing ledger, and that he personally mailed the claim forms.<sup>100</sup>

This proof was challenged by the defendant insurer as not satisfying the foundational requirements as a business record exception to the hearsay rule because the president of the third-party billing company lacked personal knowledge of the billing practices of the medical provider.<sup>101</sup> In an opinion by Judge Abdus-Salaam, the Court of Appeals held that for purposes of pursuing payment of a medical claim under the No-Fault Insurance Law, the affidavit of the billing company's president satisfied the requirements of the business record exception to the hearsay rule, as set forth in Civil Practice Law and Rules 4518(a).<sup>102</sup> Furthermore, the proof of mailing was sufficient, together with the un rebutted presumption of receipt, to complete the prima facie showing of a timely request for payment, and the defendant's failure to pay within thirty days, as required by statute.<sup>103</sup>

This holding has both substantive and procedural implications. Substantively, upon proof of non-payment (and in the absence to a challenge of coverage) an insurer is, in effect, precluded from challenging the amount of the bill at issue or the medical treatment provided.<sup>104</sup> Procedurally, the path to summary judgment and ultimately payment has become more streamlined where the plaintiff submits sufficient proof, in evidentiary form, that a claim was properly prepared and timely mailed, and remained unpaid and unchallenged for more than thirty days.<sup>105</sup>

Judge Stein issued a dissenting opinion which was critical of what she termed the "preclusion rule," which prevented an insurer from challenging a bill after thirty days, and also which removed any requirement that the movant medical provider make a showing of medical necessity for the charges incurred in moving for summary judgment.<sup>106</sup>

---

100. *Viviane Etienne Med. Care*, 25 N.Y.3d at 502–03, 35 N.E.3d at 455, 14 N.Y.S.3d at 287.

101. *Id.* at 503, 35 N.E.3d at 455, 14 N.Y.S.3d at 287 (citing N.Y. C.P.L.R. 4518(a) (McKinney 2007)).

102. *Id.* at 508, 35 N.E.3d at 459, 14 N.Y.S.3d at 291; *see* N.Y. C.P.L.R. 4518(a).

103. *Viviane Etienne Med. Care*, 25 N.Y.3d at 510, 35 N.E.3d at 460, 14 N.Y.S.3d at 292 (Stein, J., dissenting) (citing N.Y. INS. LAW § 5106(a) (McKinney 2009)).

104. *See id.* at 510, 35 N.E.3d at 461, 14 N.Y.S.3d at 293 (citing *Fair Price Med. Supply Corp. v. Travelers Indem. Co.*, 10 N.Y.3d 556, 563, 890 N.E.2d 233, 236, 860 N.Y.S.2d 471, 474 (2008)).

105. *Id.* at 501, 35 N.E.3d at 454, 14 N.Y.S.3d at 286 (majority opinion).

106. *Id.* at 515, 35 N.E.3d at 464, 14 N.Y.S.3d at 296 (Stein, J., dissenting).

*F. Statutory Presumptions*

In *People v. Kims*, the Court of Appeals addressed the statutory “drug factory” presumption of Penal Law section 220.25(2).<sup>107</sup> This presumption provides an evidentiary shortcut in the prosecution of drug sale crimes where a defendant is not in actual physical possession of drugs at the time of his arrest.<sup>108</sup> It permits the jury to presume criminal involvement where a defendant is apprehended in “close proximity” to the drugs sufficient to evince his or her participation in an apparent drug sale operation.<sup>109</sup> The Court noted that the applicability of the presumption is necessarily fact specific, as it turns on the physical distance between the defendant and the drugs and also whether the defendant is in “immediate flight” from the criminal evidence.<sup>110</sup> As addressed below, the facts in *Kims* raised issues regarding whether it matters whether a defendant is apprehended while under surveillance or after leaving a drug house and whether being apprehended in his vehicle in a driveway in front of the house is insufficient “close proximity” to trigger the statutory presumption.<sup>111</sup>

The defendant in *Kims* was convicted of various drug related crimes based on evidence of his involvement in a drug sale operation at his residence.<sup>112</sup> The defendant, under surveillance at the time of his arrest, was observed leaving the ground floor apartment of his residence with his cousin and walking towards his vehicle, which was parked in the driveway.<sup>113</sup> They entered the vehicle, locked the door, and attempted unsuccessfully to move their vehicle out of the parking spot.<sup>114</sup>

Police confronted the defendant and his cousin with guns drawn, and ordered them to put up their hands and exit the vehicle.<sup>115</sup> They ultimately did so, and law enforcement discovered packages of cocaine on the cousin’s person, on the ground next to the passenger door where the cousin had been removed, and on the cousin.<sup>116</sup> “A subsequent

---

107. (*Kims II*), 24 N.Y.3d 422, 425, 24 N.E.3d 573, 575, 999 N.Y.S.2d 337, 339 (2014) (citing N.Y. PENAL LAW § 220.25(2) (McKinney 2008)).

108. N.Y. PENAL LAW § 220.25(2).

109. *Kims II*, 24 N.Y. at 429, 24 N.E.3d at 578, 999 N.Y.S.2d at 342 (citing N.Y. PENAL LAW § 220.25(2)).

110. *Id.* at 434–35, 24 N.E.3d at 581–82, 999 N.Y.S.2d at 345–46.

111. *Id.* at 435–36, 24 N.E.3d at 582–83, 999 N.Y.S.2d 346–47.

112. *Id.* at 425, 24 N.E.3d at 575, 999 N.Y.S.2d at 339.

113. *Id.* at 426, 24 N.E.3d at 576, 999 N.Y.S.2d at 340.

114. *Kims II*, 24 N.Y. at 426–27, 24 N.E.3d at 576, 999 N.Y.S.2d at 340.

115. *Id.*

116. *Id.* at 427, 24 N.E.3d at 576, 999 N.Y.S.2d at 340.

2016]

**Evidence**

953

search of the vehicle pursuant to a warrant led to the discovery of more cocaine” within the console area.<sup>117</sup> Immediately following the arrest, officers entered the residence using the defendant’s key.<sup>118</sup> They discovered cocaine and marijuana, as well as various devices and equipment used in illegal drug production and a large sum of money.<sup>119</sup>

At trial, the prosecution presented physical evidence and testimony regarding the defendant’s involvement in a drug sale operation at this residence.<sup>120</sup> The judge charged the jury under two theories of criminal possession, both of which involved a presumption of possession.<sup>121</sup> The court charged the common law presumption of constructive possession of drugs, which allows a jury to presume that

a person has tangible property in his or her constructive possession when that person exercises a level of control over the area in which the property is found or over the person for whom the property is seized sufficient to give him or her the ability to use or dispose of the property.<sup>122</sup>

The court also charged the statutory “drug factory” presumption, applicable to drug sale operations, as found in Penal Law section 220.25(2), which requires proof that the defendant was in “close proximity” to the drug production evidence at the time of his apprehension.<sup>123</sup>

On appeal to the Appellate Division, Fourth Department, the conviction was reversed, with the majority concluding that the trial court committed reversible error by charging the jury on the statutory drug factory presumption, because the defendant was not within “close proximity” of the drug production activity at the time he was apprehended, as required by statute.<sup>124</sup> The appellate division further found that the error was not harmless, because there was no way to determine whether the jury relied upon the statutory drug factory presumption or the common law constructive possession presumption in convicting the defendant of criminal possession of a controlled

---

117. *Id.*

118. *Id.* at 427, 24 N.E.3d at 577, 999 N.Y.S.2d at 341.

119. *Kims II*, 24 N.Y.3d at 427, 24 N.E.3d at 577, 999 N.Y.S.2d at 341.

120. *Id.* at 428, 24 N.E.3d at 577, 999 N.Y.S.2d at 341.

121. *Id.* at 429, 24 N.E.3d at 578, 999 N.Y.S.2d at 342.

122. *Id.* at 430, 24 N.E.3d at 578, 999 N.Y.S.2d at 342.

123. *Id.* at 438, 24 N.E.3d at 584, 999 N.Y.S.2d at 348; N.Y. PENAL LAW § 220.25(2) (McKinney 2008).

124. *People v. Kims (Kims I)*, 96 A.D.3d 1595, 1597, 947 N.Y.S.2d 729, 731 (4th Dep’t 2012) (citing *People v. Edwards*, 23 A.D.3d 1140, 1141, 804 N.Y.S.2d 525, 526 (4th Dep’t 2005)); N.Y. PENAL LAW § 220.25(2).

substance in first and third degrees.<sup>125</sup> The dissent by Justice Scudder concluded that the trial evidence supported that the apartment was used as a drug factory operation and that the defendant was, in his opinion, in close proximity to the cocaine when he was arrested outside the residence in his vehicle.<sup>126</sup>

The Court of Appeals agreed with the appellate division majority that the trial court should not have charged the jury on the statutory “drug factory” presumption of Penal Law section 220.25(2), and that because it had been impossible to discern whether the jury relied upon the statutory presumption or the common law constructive possession presumption in its verdict, the error was not harmless, and a new trial was granted.<sup>127</sup>

In conducting a review of the facts, the Court noted that the defendant was apprehended outside of the residence and in his vehicle.<sup>128</sup> The fact that the defendant had left the premises made the justification for the presumption of constructive possession of the drug-making activity, which is based upon “presume[ed] knowing,” “less tenable.”<sup>129</sup> The Court noted that, recognizing “the realities of police investigatory work into illegal drug sales,” the presumption can apply under certain circumstances where the defendant has left the premises, such as when he is “caught in immediate flight” or “fleeing the premises, ‘upon sudden appearance of the police.’”<sup>130</sup> That was not the case here, as the defendant was apprehended in his vehicle, apparently unaware until that point that he was under police surveillance and in eminent risk of apprehension.<sup>131</sup>

The Court did provide some guidelines as to how far from the premises a defendant may be apprehended and still be subject to the presumption with the statement “that each incremental enlargement of the distance between the defendant and the premises where the drugs are found tests the underlying justification of the presumption and makes it susceptible to challenge.”<sup>132</sup> Applying these principles to the facts, the Court determined that the statutory presumption was not applicable with regard to the drugs and drug sale paraphernalia that had

---

125. *Kims I*, 96 A.D.3d at 1597, 947 N.Y.S.2d at 731.

126. *Id.* at 1600, 947 N.Y.S.2d at 735 (Scudder, P.J., dissenting).

127. *Kims II*, 24 N.Y.3d at 438, 24 N.E.3d at 584, 999 N.Y.S.2d at 348; *see* N.Y. PENAL LAW § 220.25(2).

128. *Kims II*, 24 N.Y.3d at 436, 24 N.E.3d at 583, 999 N.Y.S.2d at 347.

129. *Id.* at 435, 24 N.E.3d at 582, 999 N.Y.S.2d at 346.

130. *Id.*

131. *Id.* at 436, 24 N.E.3d at 583, 999 N.Y.S.2d at 347.

132. *Id.* at 435, 24 N.E.3d at 582, 999 N.Y.S.2d at 346.



been found in the residence.<sup>133</sup> The Court rejected the prosecution's argument that the presumption applies so long as a defendant is under surveillance for the entire time after the defendant exited the premises, finding that such an interpretation of the statute "lacks a definable endpoint."<sup>134</sup>

The Court also reviewed the defendant's objections based on the introduction into evidence of prior uncharged crimes and misconduct, and alleged violation of *Molineux*.<sup>135</sup> The trial court permitted testimony about the defendant's gang affiliation, to which the defendant objected.<sup>136</sup> As to this issue, the Court found the admission of gang affiliation was not relevant to "any material issue"<sup>137</sup> and should not have been admitted. However, in light of overwhelming evidence of guilt, the Court determined that any error in admitting such testimony regarding gang affiliation was harmless.<sup>138</sup>

*G. Jury Charge as to Defendant's "Special Skills" in a Product Liability Lawsuit*

New York Pattern Jury Instructions (PJI) 2:15 contains a "Special Skills" instruction that is applicable to a defendant who possesses specialized skills in a trade or profession.<sup>139</sup> This instruction does not create a presumption or inference, but rather instructs the jury that a party that holds itself out as possessing special expertise must be held to a higher standard of care in a negligence lawsuit.<sup>140</sup> Typically, the charge is requested in a medical malpractice lawsuit, where it is applicable to the expertise of the defendant healthcare provider.<sup>141</sup>

In *Reis v. Volvo Cars of North America*, this charge was given to the jury in a product liability lawsuit in connection with the standard of care applicable to the defendant-manufacturer.<sup>142</sup> The plaintiff in *Reis* sought damages for injuries sustained when he was struck by a vehicle that lurched suddenly out of gear while stopped, in drive gear, with the

---

133. *Kims II*, 24 N.Y.3d at 435, 24 N.E.3d at 582, 999 N.Y.S.2d at 346.

134. *Id.* at 437, 24 N.E.3d at 584, 999 N.Y.S.2d at 348.

135. *Id.* at 438, 24 N.E.3d at 584, 999 N.Y.S.2d at 348 (citing *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901)).

136. *Id.*

137. *Id.* at 439, 24 N.E.3d at 585, 999 N.Y.S.2d at 349.

138. *Kims II*, 24 N.Y.3d at 438, 24 N.E.3d at 585, 999 N.Y.S.2d at 349.

139. N.Y. PATTERN JURY INSTRUCTIONS—CRIMINAL 2:15 (2015).

140. *Id.*

141. *Id.*

142. (*Reis II*), 24 N.Y.3d 35, 39, 18 N.E.3d 383, 385, 993 N.Y.S.2d 672, 674 (2014).

engine running.<sup>143</sup> He sued the defendant manufacturer, contending that the vehicle was unsafe because the manual transmission vehicle was not equipped with a “starter interlock” that would prevent the vehicle from being started when in gear.<sup>144</sup> The plaintiff also contended that it was well known in the industry that a vehicle with a manual transmission could lurch forward if started while in a drive gear.<sup>145</sup> The plaintiff presented proof at trial that several other major manufacturers did use the starter interlock devices on manual transmission vehicles manufactured in the same model year as the vehicle at issue.<sup>146</sup> The defendant offered proof of manufacturers who declined to do so, and defended its own choice not to employ an interlock device.<sup>147</sup>

The case was submitted to the jury on theories of failure to warn, as well as negligent design and strict product liability design defect claims, both of which were based on the absence of a starter interlock.<sup>148</sup> The court charged the jury with PJI 2:15, the “special knowledge” instruction, and also PJI 2:16, an instruction regarding industry custom and practice.<sup>149</sup>

The jury responded “yes” to the question of whether Volvo was negligent in its design, but answered “no” to the question of whether the product was “not reasonably safe” under the strict products design defect theory.<sup>150</sup> The jury also found in favor of the plaintiff on the failure to warn claims.<sup>151</sup>

In post-trial proceedings, the trial court entered judgment in plaintiff’s favor on the design defect claim.<sup>152</sup> The failure to warn claims were dismissed, based on a post-verdict decision from the Appellate Division, First Department, on the defendant’s appeal of the denial of its summary judgment motion.<sup>153</sup>

On appeal to the Appellate Division, First Department, the majority found no error in the trial court charging the jury on special

---

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Reis II*, 24 N.Y.3d at 39, 18 N.E.3d at 385, 993 N.Y.S.2d at 674.

148. *Id.* at 39–40, 18 N.E.3d at 385–86, 993 N.Y.S.2d at 674–75.

149. *Id.* at 39, 18 N.E.3d at 385, 993 N.Y.S.2d at 674.

150. *Id.* at 40, 18 N.E.3d at 386, 993 N.Y.S.2d at 675.

151. *Id.*

152. *Reis II*, 24 N.Y.3d at 40, 18 N.E.3d at 386, 993 N.Y.S.2d at 675.

153. *Id.* (citing *Reis v. Volvo Cars of N. Am. (Reis I)*, 105 A.D.3d 663, 663, 964 N.Y.S.2d 125, 127 (1st Dep’t 2013)).

2016]

**Evidence**

957

knowledge (PJI 2:15) and custom or business practices (PJI 2:16).<sup>154</sup> In a dissent by Judge Abdus-Salaam, she would have remanded for a new trial on the ground that it was error to charge custom or business practice (PJI 2:16), as she found no evidence in the record of a custom, policy, or procedure reflecting an industry-wide practice with respect to starter interlocks.<sup>155</sup>

The Court of Appeals considered the issues of whether it was error to instruct the jury on PJI 2:15, special knowledge, and PJI 2:16, industry custom or practice.<sup>156</sup> In a majority opinion by Judge Smith, the Court held that the special knowledge instruction should not have been given in this case, noting that the charge was designed for professional malpractice, where the defendant is generally held to a level of skill and care by others in the community who practice the same profession, as compared with negligence cases, where the defendant's conduct is held to that of a reasonable person under like circumstances.<sup>157</sup>

More fundamentally, the Court recognized that PJI 2:15 is an assertive charge instructing the jury that a defendant does possess special skills, rather than asking them to find whether the defendant possessed such skills, and further instructing that if the jury finds that the defendant failed to exercise the same degree of skill as a similarly situated manufacturer, they must find the defendant negligent.<sup>158</sup> In this case, the trial court charged the jury that "if you decide that Volvo did not use the same degree of skill and care [as other manufacturers selling automobiles in the United States], then you *must* find that Volvo was negligent."<sup>159</sup> The Court concluded that the issuance of this charge, which mandated a finding of negligence, may have confused the jury, as reflected in their verdict, which found for the plaintiff on negligent design but for the defendant on design defect.<sup>160</sup> This error required a re-trial.<sup>161</sup>

The Court also addressed the defendant's objection to the court's issuance of the industry custom and practice charge found in PJI 2:16, which instructed the jury to determine whether there was evidence of a

---

154. *Reis I*, 105 A.D.3d at 664, 964 N.Y.S.2d at 128.

155. *Id.* at 665, 965 N.Y.S.2d at 129 (Abdus-Salaam, J., dissenting).

156. *Reis II*, 24 N.Y. 3d at 42–44, 18 N.E.3d at 387–89, 993 N.Y.S.2d at 676–78.

157. *Id.* at 42, 18 N.E.3d at 387, 993 N.Y.S.2d at 676.

158. *Id.* at 44, 18 N.E.3d at 388–89, 993 N.Y.S.2d at 677–78.

159. *Id.* at 43, 18 N.E.3d at 388, 993 N.Y.S.2d at 677.

160. *Id.*

161. *Reis II*, 24 N.Y. 3d at 43, 18 N.E.3d at 388, 993 N.Y.S.2d at 677.

general custom and practice by the defendant, in this case an automobile manufacturer, in determining whether the defendant exercised or failed to act with reasonable care.<sup>162</sup> The Court determined that this charge was properly given, noting that its language and mandate was markedly different from that of PJI 2:15, in that it afforded the jury the opportunity to determine in the first instance whether there was sufficient evidence of a custom and practice, and further, it allowed, rather than mandated, that if such a custom and practice existed, it may be taken into account in their assessment of defendant's negligence.<sup>163</sup> As contrasted with PJI 2:15, this instruction permitted a finding of custom and practice, but did not require it.<sup>164</sup>

Of some significance in the area of product liability law, the Court also referenced in dicta that the negligent design and design defect theories submitted to the jury were redundant, based on the Court's decisions in *Denny v. Ford Motor Co.*<sup>165</sup> and *Adams v. Genie Industries, Inc.*<sup>166</sup> As neither party objected, this issue was not before the Court.<sup>167</sup> However, this dicta provides a strong indication of the Court's inclination toward cases where a jury is asked to consider both theories.

## II. EXPERTS

### A. Expert Testimony Regarding Ethnicity-Based Statistics

In a lead paint personal injury lawsuit from the United States District Court, Eastern District of New York, *G.M.M. v. Kimpson*, Judge Jack B. Weinstein addressed the admissibility and constitutionality of ethnicity-based statistics, as are commonly relied upon by vocational rehabilitation and economic experts to project future economic loss damages in personal injury lawsuits.<sup>168</sup> The underlying case alleged that an infant child sustained injury to his central nervous system as a result of exposure to lead paint in an apartment leased by the infant-plaintiff's parents.<sup>169</sup> At trial, the plaintiff presented proof through a forensic vocational rehabilitation expert and a forensic economist of the infant-

---

162. *Id.* at 44, 18 N.E.3d at 388, 993 N.Y.S.2d at 677.

163. *Id.* at 44, 18 N.E.3d at 388–89, 993 N.Y.S.2d at 677–78.

164. *Id.*

165. 87 N.Y.2d 248, 258, 662 N.E.2d 730, 735, 639 N.Y.S.2d 250, 255 (1995).

166. 14 N.Y.3d 535, 542–43, 929 N.E.2d 380, 384, 903 N.Y.S.2d 318, 322 (2010).

167. *Reis II*, 24 N.Y.3d at 40, 18 N.E.3d at 386, 993 N.Y.S.2d at 675.

168. 116 F. Supp. 3d 126, 128–29 (E.D.N.Y. 2015).

169. *Id.* at 131.

plaintiff's future economic prospects if had he not been poisoned with lead.<sup>170</sup>

During direct examination, the plaintiff's vocational rehabilitation expert recounted the methodology he used to predict what the child could have become, had he not sustained the lead paint related injuries and disabilities.<sup>171</sup> He described the considerable academic achievements of various members of the infant-plaintiff's extended family, including the fact that his father held a baccalaureate degree, and his mother, a masters of fine arts, and projected that there is a "moderately high probability" that had he not been injured, he would have completed a master's degree.<sup>172</sup> The expert did take into account certain socioeconomic statistics regarding Hispanic individuals, but based "primary" reliance on the parents' backgrounds.<sup>173</sup> The evidentiary issue in the case was framed primarily during the cross-examination of this expert, when the defendant's attorney questioned whether the expert's opinions had taken into account statistics reflecting a relatively low general educational background of an ethnic group he characterized as "Hispanics."<sup>174</sup>

At that point, on its own motion, the court excluded ethnicity as a factor in damages computations, and so instructed the jury and the expert witness while on the stand.<sup>175</sup> The court's ruling was based on its prior decision in *McMillan v. City of New York*<sup>176</sup> in which the court held that racially-based life expectancy and related data may not be used to find reduced life expectancy for an African American claimant in computing damages based on predictions of life expectancy.<sup>177</sup>

The decision on this evidentiary issue is an interesting commentary on ethnic and race-based statistics as are routinely employed by parties, their experts, and the courts in civil proceedings.<sup>178</sup> Experts generally rely on statistics created by various agencies of the United States, including the United States Census Bureau and the United States Department of Labor, as a foundational basis to project work life and earnings potential.<sup>179</sup> The decision notes that courts routinely employ

---

170. *Id.*

171. *Id.*

172. *Id.* at 133–34.

173. *Kimpson*, 116 F. Supp. 3d at 132.

174. *Id.* at 132.

175. *Id.* at 134.

176. 253 F.R.D. 247 (E.D.N.Y. 2008).

177. *Id.* at 248.

178. *Kimpson*, 116 F. Supp. 3d at 137.

179. *Id.* at 143.

life and work expectancy tables based on the Bureau of Labor Statistics, U.S. Department of Labor, Bulletin 2254, with 1986 tables in their jury instructions.<sup>180</sup> Such tables are broken down into categories of sex, race, and educational attainment, and have not been revised by the Bureau of Labor Statistics since 1986, yet are still routinely charged to the jury for purposes of determining damages in tort cases in New York State.<sup>181</sup>

In his decision, Judge Weinstein described ethnicity as essentially a “fiction” that should not be afforded legal status for the purposes of predicting future earning capacity and life expectancy.<sup>182</sup> He held that the use of race and ethnicity-based statistics violates due process and equal protection, and accordingly, such data is inadmissible to compute life expectancy and damages, or to reduce such damages.<sup>183</sup> As neither party objected to the court’s ruling, there was no appeal on this issue.<sup>184</sup>

#### *B. Boundaries on the Scope of Police Expert Testimony*

In *People v. Inoa*, the Court of Appeals addressed the use of police expert testimony not only with respect to matters to aid the jury, but that which goes considerably further, in explaining and cohesively presenting prosecution evidence to the jury.<sup>185</sup> The underlying prosecution was a murder for hire by the defendant, Inoa, at the request of former gang leader, Oman Gutierrez, who formulated the plot just prior to his release from prison, ostensibly to eliminate a competitor.<sup>186</sup>

At the trial, the prosecution presented the testimony of New York City Police Detective Rolando Rivera, who had been involved in the original investigation and prosecution of Gutierrez and his gang.<sup>187</sup> Detective Rivera had a great deal of familiarity with Gutierrez and his associates, as well as gang terminology and methodology.<sup>188</sup> At trial, he was qualified by the court as an expert in decoding telephone conversations, and explaining and defining code words employed by gang members.<sup>189</sup> However, his testimony went much further, as he told a cohesive story of the planning of the murder for hire, as developed by his decoding and interpretation of a significant number of recorded

---

180. *Id.* at 150–51.

181. *Id.* at 150.

182. *Id.* at 151.

183. *Kimpson*, 116 F. Supp. 3d at 152.

184. *Id.* at 134.

185. 25 N.Y.3d 466, 472, 34 N.E.3d 839, 844, 13 N.Y.S.3d 329, 333 (2015).

186. *Id.* at 468, 34 N.E.3d at 840, 13 N.Y.S.3d at 330.

187. *Id.* at 470, 34 N.E.3d at 842, 13 N.Y.S.3d at 332.

188. *Id.*

189. *Id.* at 470–71, 34 N.E.3d at 842, 13 N.Y.S.3d at 332.

telephone conversations, including those of Gutierrez's girlfriend, Alda Duran, who also testified during the trial.<sup>190</sup> In the course of his work on the case, Detective Rivera reviewed tape recordings and transcripts, translated, transcribed, and analyzed the recorded conversations and also met with the two women, Ms. Duran and Joaris Grullon, driver of the getaway vehicle after the shooting.<sup>191</sup>

The Court noted that there would have been no issue regarding the scope of Detective Rivera's testimony had he been limited to decoding gang expressions in the recordings, as such has been held to be a proper subject of expert testimony.<sup>192</sup> However, Detective Rivera's testimony went beyond decoding words, as it served to explain what transpired and what was meant by the various conversations that were recorded.<sup>193</sup> His testimony was expanded to explain "the meaning of virtually everything that was said during Oman Gutierrez's recorded conversations, whether it was coded or not."<sup>194</sup>

The Court held that Detective Rivera's testimony went too far, finding that in this case, "an expert so palpably overtakes the jury's function to decide matters within its unaided competence, that abuse may be found."<sup>195</sup> The Court's rationale drew upon two cases decided by the Second Circuit Court of Appeals, *United States v. Mejia*<sup>196</sup> and *United States v. Dukagjini*.<sup>197</sup> In these federal cases, the Court noted, a government agent, initially qualified as an expert for limited purposes, "ended up testifying beyond any cognizable field of expertise as an apparently omniscient expositor of the facts of the case."<sup>198</sup> The Court was not critical of Detective Rivera's investigative efforts, and in fact, applauded them.<sup>199</sup> The concern was that a jury should decide a case based on the evidence presented at trial, aided in expert testimony only where necessary, not to provide a narrative description of the meaning of witness testimony and the conclusions to be drawn.<sup>200</sup>

In the case of Mr. Inoa however, the evidence of his guilt was

---

190. *Inoa*, 25 N.Y.3d at 471, 34 N.E.3d at 843, 13 N.Y.S.3d at 333.

191. *Id.* at 470–71, 34 N.E.3d at 842, 13 N.Y.S.3d at 332.

192. *Id.* at 473, 34 N.E.3d at 844, 13 N.Y.S.3d at 334 (citing *People v. Brown*, 97 N.Y. 2d 500, 506, 769 N.E.2d 1266, 1270, 743 N.Y.S.2d 374, 378 (2002)).

193. *Id.* at 473–74, 34 N.E.3d at 844–45, 13 N.Y.S.3d at 334–35.

194. *Id.*

195. *Inoa*, 25 N.Y.3d at 472, 34 N.E.3d at 843, 13 N.Y.S.3d at 333.

196. 543 F.3d 179 (2d Cir. 2008).

197. 326 F.3d 45 (2d Cir. 2002).

198. *Inoa*, 25 N.Y.3d at 473, 34 N.E.3d at 844, 13 N.Y.S.3d at 334.

199. *Id.* at 475, 34 N.E.3d at 846, 13 N.Y.S.3d at 336.

200. *Id.* at 475, 34 N.E.3d at 845, 13 N.Y.S.3d at 335

overwhelming. The Court found that they jury's verdict did not necessarily rely upon Detective Rivera's narrative, which substantially confirmed the testimony of one of the witnesses to the recorded conversations, Ms. Duran.<sup>201</sup> In fact, the Court found Detective Rivera largely superfluous in light of ample evidence that a substantial sum of money had been promised to the defendant, by the then-incarcerated co-defendant, that could only have referred to the planned murder of the victim.<sup>202</sup>

In deeming the error of the admission of Detective Rivera's "extensive summation testimony" to be harmless, the Court cautioned that in a different case, such expansive testimony could amount to reversible error, and specifically admonished that "the result of this appeal should not encourage any expectation that the harmless error doctrine will reliably insulate the practice of using government agents as expert summation witnesses, and trial courts should, accordingly, be vigilant against the serious risks that such usage entails."<sup>203</sup>

*C. An Engineer Is Not Automatically Qualified as an Expert in All Cases*

In *Flanger v. 2461 Elm Realty Corporation*, the Appellate Division, Third Department, reminded that the designation "P.E.," meaning that a person is a licensed professional engineer, is "insufficient to qualify that person as an expert in a particular case, absent any proof that he or she had any specialized training, personal knowledge or practical experience related to the subject at issue."<sup>204</sup> The plaintiff in *Flanger* alleged an unsafe property condition that resulted in a tripping hazard, causing injury.<sup>205</sup> The defendant's motion for summary judgment was granted by the supreme court.<sup>206</sup>

On appeal, the plaintiff contended that the court should not have considered the affidavit of the defendant's alleged expert engineer, as there was no foundational basis offered in the affidavit that he possessed the requisite skill, training, or experience relevant to the mechanism at issue, which was the design and maintenance of curbs and sidewalks.<sup>207</sup> The court agreed, finding that the defendant failed to describe his

---

201. *Id.* at 476, 34 N.E.3d at 846, 13 N.Y.S.3d at 336.

202. *Id.*

203. *Iona*, 25 N.Y.3d at 476–77, 34 N.E.3d at 846–47, 13 N.Y.S.3d at 336–37.

204. 123 A.D.3d 1196, 1198, 998 N.Y.S.2d 502, 504 (3d Dep't 2014).

205. *Id.* at 1196, 998 N.Y.S.2d at 503.

206. *Id.*

207. *Id.* at 1197–98, 998 N.Y.S.2d at 504.



2016]

**Evidence**

963

qualifications to offer the opinions stated in his affidavit.<sup>208</sup> Accordingly, the court below should not have considered the defendant's expert affidavit, and the defendant's motion for summary judgment should have been denied for failure to make the requisite prima facie showing.<sup>209</sup>

**III. EXCEPTIONS TO THE HEARSAY RULE*****A. Facebook Page as a Party Admission***

As a general proposition, a party's social networking page, assuming proper foundation that it was, in fact, created and published by that party on a social networking site, could be properly offered as an admission or even declaration against interest against that party at a trial.

In *United States v. Vayner*, the Second Circuit addressed the foundational requirements for admissibility of a profile page from a Russian social networking site akin to Facebook.<sup>210</sup> The defendant in *Vayner* was convicted of the crime of unlawful transfer of a false identification document.<sup>211</sup> The government's principal evidence against him was a cooperating witness and former friend who claimed familiarity with the defendant's work as a forger because he had previously paid him to create false identification documents.<sup>212</sup>

In the context of the crime at issue, the cooperating witness had asked the defendant to create a forged birth certificate that would show he was the father of a fictitious infant daughter.<sup>213</sup> The defendant agreed to forge the birth certificate without charge, and began creating the false birth certificate on a computer while the pair sat together at a Brooklyn Internet café.<sup>214</sup> The witness testified that the defendant sent the completed forged birth certificate to him from a GMail address identified as *azmadeuz@gmail.com*, and the e-mail with attached forged birth certificate was introduced into evidence.<sup>215</sup>

At trial, the government presented witnesses who corroborated certain aspects of the cooperating witness's testimony, as well as expert

---

208. *Id.*

209. *Flanger*, 123 A.D.3d at 1198, 998 N.Y.S.2d at 505.

210. 769 F.3d 125, 127 (2d Cir. 2014).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Vayner*, 769 F.3d at 127.

testimony establishing that the e-mail originated in New York.<sup>216</sup> However, there was no evidence tracing the e-mail to a specific computer or IP address controlled by the defendant.<sup>217</sup> The government attempted to fill this evidentiary gap by introducing a printout of the defendant's profile page from a social networking site, along with testimony of a special agent who identified and explained entries on the social networking page, which included, among other things, the defendant's photograph and a reference to the defendant as "azmadeuz," the name referenced in the GMail e-mail address from which the forged birth certificate was allegedly sent.<sup>218</sup> The social networking page, along with testimony, was admitted over the defendant's objection.<sup>219</sup> The defendant was convicted of the single charge contained in the indictment.<sup>220</sup>

The Second Circuit, under an abuse of discretion standard of review, determined that the social networking page had not been properly authenticated pursuant to Rule 901 of the Federal Rules of Evidence, and therefore, its admission was in error.<sup>221</sup> The court further held that the error was not harmless, as the evidence provided a necessary component of evidence to link the forged document to the defendant.<sup>222</sup> The court vacated the conviction and remanded for a retrial.<sup>223</sup>

The court noted that Rule 901 of the Federal Rules of Evidence governs authentication of documents and requires that the proponent provide sufficient foundation to establish that the item is what the proponent claims that it is.<sup>224</sup> If basic foundational requirements have been met, the evidence is allowed in, to be considered by the jury who will be charged with the ultimate determination as to whether the evidence is what the proponent claims it to be.<sup>225</sup>

As applied to the social networking profile page, the court concluded that the government did not sufficiently establish that the content was created by the defendant and therefore qualified as evidence

---

216. *Id.*

217. *Id.*

218. *Id.* at 128.

219. *Id.*

220. *Vayner*, 769 F.3d at 129.

221. *Id.* at 131.

222. *Id.* at 133–34.

223. *Id.* at 134–35.

224. *Id.* at 129.

225. *Vayner*, 769 F.3d at 130.

of his own statements.<sup>226</sup> There was no evidence the defendant created the page or was responsible for its contents.<sup>227</sup> It was not enough that a picture of the defendant appeared on the profile page along with other personal identifying information without the necessary foundation that the information was placed there by the defendant.<sup>228</sup>

The court declined to provide guidance as to the quality of evidence that would have been sufficient to authenticate the social networking page and warrant consideration by a jury, but this decision will be useful to practitioners in both state and federal courts to underscore the foundational requirements for items procured from the Internet.<sup>229</sup>

### *B. Prompt Outcry Not Previously Disclosed*

In *People v. Shaulov*, the Court of Appeals reminds that a prosecutor's affirmative representations at a pretrial hearing regarding proof at trial may be binding and result in reversible error if violated.<sup>230</sup> The defendant in *Shaulov* had been charged with multiple counts of non-consensual rape and other sex crimes.<sup>231</sup> He was convicted of crimes related to sexual criminal acts with a minor, but acquitted of crimes related to the theory of consent by reason other than age.<sup>232</sup> At a pretrial hearing, the prosecution made a representation to the court and defense counsel that the complainant had not disclosed the underlying sexual assault to anyone until at least six months after it happened, and there would be no "prompt outcry" testimony.<sup>233</sup> The court then ruled that in the event that the defendant attempted to impeach complainant based upon delayed disclosure, the prosecution would have the right to present expert testimony about rape trauma syndrome, as it relates to delayed reporting.<sup>234</sup>

In reliance upon this information, defense counsel referred in his opening statement to there being a long delay in reporting of the accusations.<sup>235</sup> On direct examination of the complainant, the prosecution elicited testimony that she did report the incident to a friend

---

226. *Id.* at 131.

227. *Id.* at 132.

228. *Id.*

229. *Id.* at 133.

230. 25 N.Y.3d 30, 35, 29 N.E.3d 227, 230, 6 N.Y.S.3d 218, 221 (2015).

231. *Id.* at 32, 29 N.E.3d at 228, 6 N.Y.S.3d at 219.

232. *Id.* at 34, 29 N.E.3d at 229, 6 N.Y.S.3d at 220.

233. *Id.* at 32, 29 N.E.3d at 228, 6 N.Y.S.3d at 219.

234. *Id.*

235. *Shaulov*, 25 N.Y.3d at 33, 29 N.E.3d at 228, 6 N.Y.S.3d at 219.

on her way home from the apartment that night, although she did not tell her friend “the whole story.”<sup>236</sup> Defense counsel objected and requested a mistrial or alternatively, a ruling striking that portion of the complainant’s testimony regarding the alleged prompt outcry, claiming that the introduction of such evidence was contrary to the prosecution’s prior representation, and significantly changed his trial strategy and defense at trial.<sup>237</sup> The trial court agreed that the testimony constituted “prompt outcry,” but denied the request for a mistrial and allowed the testimony to stand, making a determination that the testimony was not overly prejudicial because a jury could still find that the complainant’s testimony in that regard was not credible.<sup>238</sup>

At trial, the prosecution also presented an expert witness who described and explained the characteristics of rape trauma syndrome, including delayed disclosure as a common response to sexual assault.<sup>239</sup> The expert’s testimony went a bit further, noting that sex crimes victims often make “partial” disclosures—an oblique reference to the complainant’s testimony that she called her friend on the night of the alleged assault but did not tell her the whole story.<sup>240</sup> The defendant’s conviction was affirmed on appeal to the Appellate Division, Second Department.<sup>241</sup>

In a unanimous decision by Judge Stein, the Court of Appeals reversed the conviction and ordered a new trial, applying the long-established rule that relevant evidence may be inadmissible where probative value is outweighed by danger of unfair surprise or undue prejudice.<sup>242</sup> The Court noted that defense counsel “shaped his trial strategy—from voir dire to his opening statement—based on his founded belief that complainant did not disclose the alleged rapes until months after they occurred.”<sup>243</sup> The record reflects that the prosecutor was aware of the complainant’s proffered testimony and that they “expected” complainant to testify the way that she did, yet “inexplicably” failed to provide this information to defense counsel in a timely fashion.<sup>244</sup>

The Court further noted that the admission into evidence of

---

236. *Id.*

237. *Id.*

238. *Id.* at 33, 29 N.E.3d at 228–29, 6 N.Y.S.3d at 219–20.

239. *Id.* at 33–34, 29 N.E.3d at 229, 6 N.Y.S.3d at 220.

240. *Shaulov*, 25 N.Y.3d at 33–34, 29 N.E.3d at 229, 6 N.Y.S.3d at 220.

241. *Id.* at 33, 29 N.E.3d at 229, 6 N.Y.S.3d at 220.

242. *Id.* at 34–35, 29 N.E.3d at 229, 6 N.Y.S.3d at 220.

243. *Id.* at 35, 29 N.E.3d at 230, 6 N.Y.S.3d at 221.

244. *Id.*

complainant's cell phone records documenting that the call was made and the expert's testimony obliquely referencing, corroborating, and explaining the complainant's partial disclosure, exacerbated prejudice to the defendant.<sup>245</sup> Therefore, the Court found that under the circumstances of this case, where the prosecution failed to correct a prior representation and defense counsel was prevented from timely and meaningfully changing his trial strategy, going so far as to emphasize the lack of any prompt outcry evidence in his own opening statement, the trial court abused its discretion by denying the defendant the remedy of a mistrial.<sup>246</sup>

### C. Selective Silence as an Admission

A defendant's right against self-incrimination gives rise to the general rule that silence may not be construed as an admission. In *People v. Williams*, the Court of Appeals held that a defendant's selective silence to certain questions posed during custodial interrogation after waiver of *Miranda* rights may not be used by the prosecution to discredit a defendant's version of events at trial.<sup>247</sup> In *Williams*, the defendant was convicted of sexual abuse in the first degree, rape in the third degree, and criminal impersonation in the third degree.<sup>248</sup> At trial, the prosecution elicited testimony from the detective who had interviewed the defendant, regarding the defendant's silence to the question of whether the defendant had ever had sex with the victim.<sup>249</sup> The proof was received over defense counsel's objection.<sup>250</sup> The defendant did not testify at trial and did not present any evidence.<sup>251</sup> The prosecution also referenced the defendant's refusal to respond to this question in his opening and closing statements to the jury.<sup>252</sup>

The defendant appealed his conviction to the Appellate Division, Fourth Department, which determined, among other things, that the comments by the prosecutor in opening and closing statements regarding the defendant's post-arrest silence in response to certain questions were improper, and that it was error to admit into evidence that portion of the detective's testimony concerning the defendant's

---

245. *Shaulov*, 25 N.Y.3d at 35, 29 N.E.3d at 230, 6 N.Y.S.3d at 221

246. *Id.*

247. (*Williams II*), 25 N.Y.3d 185, 188, 31 N.E.3d 103, 104, 8 N.Y.S.3d 641, 642.

248. *Id.* at 190, 31 N.E.3d at 105, 8 N.Y.S.3d 643.

249. *Id.* at 189, 31 N.E.3d at 105, 8 N.Y.S.3d 643.

250. *Id.*

251. *Id.*

252. *Williams II*, 25 N.Y.3d at 189–90, 31 N.E.3d at 105, 8 N.Y.S.3d 643.

silence.<sup>253</sup> However, the court found such errors were harmless and affirmed the conviction.<sup>254</sup>

On appeal, the Court of Appeals determined that the issue regarding the prosecutor's reference to selective silence in opening statements was preserved, but not as to summation, due to the defendant's attorney's failure to object.<sup>255</sup> The Court also ruled that the defense's objection to the detective's testimony regarding the defendant's silence in response to certain questions was also preserved.<sup>256</sup> Addressing this issue, the Court reviewed the well-established evidentiary principle that evidence of a defendant's pretrial silence is generally inadmissible<sup>257</sup> and cannot be used for impeachment purposes.<sup>258</sup> Although there are rare exceptions when it would be permissible for the prosecution to refer to a defendant's silence during their case in chief, the prosecution is generally prohibited from referencing a defendant's silence during their direct case and may not use a defendant's silence to impeach his or her trial testimony.<sup>259</sup>

The Court did, by way of example, refer to prior cases where it found exceptions to the general rule. In *People v. Rothschild*, the defendant police officer was accused of soliciting a bribe.<sup>260</sup> He testified at trial that he had agreed to accept money from the victim in order to arrest the victim for bribery.<sup>261</sup> Upon cross-examination, the prosecutor elicited from the defendant that he had not reported the victim's supposed bribe offer to his superior officers.<sup>262</sup> As he had a duty to inform his superior officers of any bribe, the Court held that such inquiry upon cross-examination was permissible.<sup>263</sup> In *People v. Savage*, the defendant testified at trial that the discharge of his gun was inadvertent and occurred in the course of the victim attempting to rob

---

253. *Id.* at 190, 31 N.E.3d at 105, 8 N.Y.S.3d 643.

254. *People v. Williams (Williams I)*, 107 A.D.3d 1391, 1394, 967 N.Y.S.2d 288, 292 (4th Dep't 2013).

255. *Williams II*, 25 N.Y.3d at 190, 31 N.E.3d at 105, 8 N.Y.S.3d 643.

256. *Id.*

257. *Id.* at 190, 31 N.E.3d at 106, 8 N.Y.S.3d at 644 (citing *People v. Rutigliano*, 261 N.Y. 103, 106–07, 184 N.E. 689, 690 (1933)).

258. *Id.* at 191, 31 N.E.3d at 106, 8 N.Y.S.3d at 644 (citing *People v. Conyers*, 52 N.Y.2d 454, 457, 420 N.E.2d 933, 934, 438 N.Y.S.2d 741, 742 (1981)).

259. *Id.*

260. 35 N.Y.2d 355, 357, 320 N.E.2d 639, 640, 361 N.Y.S.2d 901, 902–03 (1974).

261. *Id.* at 359, 320 N.E.2d at 641, 361 N.Y.S.2d at 904.

262. *Id.*

263. *Id.* at 360–61, 320 N.E.2d at 642, 361 N.Y.S.2d at 905.

the defendant.<sup>264</sup> On cross-examination, the prosecutor was permitted to ask the defendant whether he advised the arresting officer that the victim had attempted to rob him.<sup>265</sup> The Court of Appeals recognized that such questioning was permissible impeachment with a potentially exculpatory statement that the defendant would have been expected to have made to the police at the time of his arrest, and the defendant's failure to do so indicated that the trial testimony was a recent fabrication.<sup>266</sup>

On appeal, the prosecution in *Williams* argued that the same circumstances that warranted exceptions to the general rule in *Rothschild* and *Savage* were applicable to support the admissibility of testimony regarding the defendant's selective silence to questions posed during his custodial interrogation.<sup>267</sup> The Court of Appeals disagreed, finding it "fundamentally different."<sup>268</sup> The Court cautioned that "if silence could constitute an answer, then the People could meet their burden simply by asking a question," and that "evidence of a defendant's selective silence 'is of extremely limited probative worth.'"<sup>269</sup> Accordingly, the Court held that a defendant's selective silence may not be used by the prosecution during their case in chief and could only be used for impeachment purposes of a defendant's trial testimony "in limited and unusual circumstances."<sup>270</sup>

The Court noted that the prosecution's use of the defendant's selective silence was also improper because the detective's testimony was elicited not only to show that the defendant did not respond when asked whether he had sex with the victim, but to show that he failed to deny the accusation.<sup>271</sup> As such, the jury was invited to infer an admission of guilt from defendant's failure to deny the accusations.<sup>272</sup> The Court determined that such testimony allowed the jury to "draw an

---

264. 50 N.Y.2d 673, 677, 409 N.E.2d 858, 859–60, 431 N.Y.S.2d 382, 383 (1980).

265. *Id.* at 677, 409 N.E.2d at 860, 431 N.Y.S.2d at 383.

266. *Id.*

267. *Williams II*, 25 N.Y.3d 185, 192, 31 N.E.3d 103, 107, 8 N.Y.S.3d 641, 645.

268. *Id.*

269. *Id.* at 193, 31 N.E.3d at 107, 8 N.Y.S.3d at 645 (quoting *People v. Conyers*, 52 N.Y.2d 458, 457, 420 N.E.2d 933, 935, 438 N.Y.S.2d 741, 743 (1981)).

270. *Id.* at 193, 31 N.E.3d at 108, 8 N.Y.S.3d at 646 (citing *Savage*, 50 N.Y.2d at 680, 409 N.E.2d at 862, 431 N.Y.S.2d at 385; *Conyers*, 52 N.Y.2d at 459, 20 N.E.2d at 935, 438 N.Y.S.2d at 743).

271. *Id.* at 193–94, 31 N.E.3d at 108, 8 N.Y.S.3d at 646.

272. *Williams II*, 25 N.Y.3d at 194, 31 N.E.3d at 108, 8 N.Y.S.3d at 646.

unwarranted inference of guilt.”<sup>273</sup> The Court further determined that the errors were not harmless as a matter of law, noting that there was “a significant probability that the jurors would have acquitted defendant if the errors did not occur.”<sup>274</sup>

There was a dissent by Judge Abdus-Salaam, expressing her opinion that she agreed with the majority that the trial court erred in permitting the prosecution to adduce evidence to elicit testimony regarding the defendant’s selective post-arrest silence on their case in chief.<sup>275</sup> However, she believed the error was harmless in light of overwhelming evidence of guilt.<sup>276</sup>

#### *D. Use of Hearsay for Another Purpose*

##### *1. To Provide Background for a Police Investigation*

In *People v. Garcia*, the Court of Appeals decided two cases involving the issue of hearsay evidence offered at criminal trials for the purported non-hearsay purpose of providing background information for a police investigation.<sup>277</sup> In both cases, defense counsel objected to hearsay evidence offered through testimony of police detectives, on the ground that it violated the defendants’ confrontation rights guaranteed by the Sixth Amendment.<sup>278</sup> The Court reached a different result in the respective cases, with analysis turning in large part on whether the hearsay evidence was testimonial in nature.<sup>279</sup>

In *Garcia*, the defendant was convicted of manslaughter in the first degree based on eyewitness testimony.<sup>280</sup> The prosecution was unable to offer the gun at issue or any physical evidence connecting the defendant to the shooting.<sup>281</sup> The prosecution’s eyewitness testimony pertained primarily to identification of the defendant as the shooter.<sup>282</sup> On direct examination, the witness testified that she was contacted by police two years after the shooting, and on that date, identified the defendant as the

---

273. *Id.* (citing *Conyers*, 52 N.Y.2d at 459, 20 N.E.2d at 935, 438 N.Y.S.2d at 743).

274. *Id.*

275. *Id.* at 195, 31 N.E.3d at 109, 8 N.Y.S.3d at 647 (Abdus-Salaam, J., dissenting).

276. *Id.* at 196, 31 N.E.3d at 109, 8 N.Y.S.3d at 647.

277. (*Garcia II*), 25 N.Y.3d 77, 80–81, 30 N.E.3d 137, 139, 7 N.Y.S.3d 246, 248 (2015).

278. *See id.* at 81–85, 30 N.E.3d 139–41, 7 N.Y.S.3d at 248–50.

279. *See id.* at 86–88, 30 N.E.3d 143–44, 7 N.Y.S.3d at 252–53.

280. *Id.* at 82, 30 N.E.3d 140, 7 N.Y.S.3d at 249.

281. *Id.*

282. *Garcia II*, 25 N.Y.3d at 81, 30 N.E.3d at 139, 7 N.Y.S.3d at 248.



shooter in a police lineup.<sup>283</sup> Upon cross-examination, the witness revealed that a few days after the shooting, she had been unable to identify the defendant when shown a photo array.<sup>284</sup> Her explanation was that the photo array did not accurately depict how the defendant appeared in person at the time of the crime.<sup>285</sup>

The prosecution then elicited testimony from the investigating detective about a conversation that he had with the victim's sister, within a day of the shooting, in which she described that her brother had been having a problem with the defendant.<sup>286</sup> The defendant objected on the basis that the prosecution was offering the unsworn testimony of the sister through the testimony of the defendant to establish the conflict between the victim and the defendant as a motive.<sup>287</sup> The testimony was received over defendant's objection, without the benefit of a limiting instruction.<sup>288</sup> The conviction was affirmed by the Appellate Division, First Department, upon reasoning that the hearsay-based testimony was offered for the purpose of explaining why the police continued to focus their investigation on the defendant.<sup>289</sup>

In *People v. DeJesus*, the defendant was convicted of murder in the second degree on evidence similar to that in *Garcia*: identification of the defendant as the shooter based on the testimony of a single eyewitness, with no other physical evidence connecting him to the crime.<sup>290</sup> Within an hour of the shooting, the eyewitness declined to identify the defendant as the shooter, but when contacted by police later that day, she identified the defendant as the shooter from a photo array.<sup>291</sup> In pretrial proceedings, it was revealed that earlier in the day, police were made aware that the victim's family had received an anonymous telephone call in which the caller identified the defendant as the shooter.<sup>292</sup>

At trial, the police detective testified that he had the defendant in mind as a specific suspect before re-contacting the witnesses later that

---

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 81–82, 30 N.E.3d at 139, 7 N.Y.S.3d at 248.

287. *Garcia II*, 25 N.Y.3d at 82, 30 N.E.3d at 140, 7 N.Y.S.3d at 249.

288. *Id.*

289. *People v. Garcia (Garcia I)*, 113 A.D.3d 553, 554, 980 N.Y.S.2d 11, 13 (1st Dep't 2014).

290. *Garcia II*, 25 N.Y.3d at 84, 30 N.E.3d at 141, 7 N.Y.S.3d at 250.

291. *Id.* at 83–84, 30 N.E.3d at 141, 7 N.Y.S.3d at 250.

292. *Id.* at 83, 30 N.E.3d at 140, 7 N.Y.S.3d at 249.

evening.<sup>293</sup> He did not refer to the anonymous call received by the victim's family that day, but the implication from his testimony was that he identified the defendant based on an unidentified source.<sup>294</sup> Defense counsel objected to the evidence, as violative of his Sixth Amendment right to confront witnesses against him.<sup>295</sup> The trial court allowed the testimony without issuing a limiting instruction, and the defendant was convicted.<sup>296</sup> The Appellate Division, First Department also affirmed the conviction in *DeJesus*, finding the detective's testimony sufficiently non-specific and thus it did not implicate his constitutional rights.<sup>297</sup>

The Court of Appeals reversed the conviction in *Garcia*, finding that the defendant's testimony regarding his conversation with the victim's sister was testimonial in nature.<sup>298</sup> The detective's testimony that there was a history of friction between the defendant and the victim was not simply background information to explain the police investigation, but rather "it was procured for the primary purpose of creating an out-of-court substitute for the testimony of [the victim's] sister regarding that discord."<sup>299</sup> Such hearsay evidence, without a limiting instruction, was a constitutional error, and warranted reversal and a new trial.<sup>300</sup> In *DeJesus*, the Court found that the hearsay testimony did not violate the defendant's confrontation rights, as it was not testimonial in nature, because it contained no implicit accusation.<sup>301</sup> The order of conviction was affirmed.<sup>302</sup>

## 2. To Explain Child Sex Abuse Victim Behavior

In another recent case, *People v. Cullen*, the Court of Appeals considered whether hearsay evidence offered through the victim's mother was admissible in a rape and incest prosecution against the defendant, the victim's father.<sup>303</sup> It was offered ostensibly for the purpose of explaining the behavior of the victim in her delayed

---

293. *Id.* at 84, 30 N.E.3d at 141, 7 N.Y.S.3d at 250.

294. *See id.*

295. *Garcia II*, 25 N.Y.3d at 84, 30 N.E.3d at 141, 7 N.Y.S.3d at 250.

296. *Id.* at 84, 30 N.E.3d at 141, 7 N.Y.S.3d at 250.

297. *People v. DeJesus*, 105 A.D.3d 476, 477, 963 N.Y.S.2d 91, 93 (1st Dep't 2013).

298. *See Garcia II*, 25 N.Y.3d at 86, 30 N.E.3d at 143, 7 N.Y.S.3d at 252.

299. *Id.*

300. *Id.* at 87, 30 N.E.3d at 143, 7 N.Y.S.3d at 252.

301. *Id.* at 88, 30 N.E.3d at 144, 7 N.Y.S.3d at 253 (citing *Ryan v. Miller*, 303 F.3d 231, 250 (2d Cir. 2002)).

302. *Id.*

303. (*Cullen II*), 24 N.Y.3d 1014, 1015, 21 N.E.3d 1009, 1010, 997 N.Y.S.2d 348, 349 (2014).

2016]

**Evidence**

973

reporting of the alleged crime.<sup>304</sup>

At trial, the prosecutor had been allowed to elicit testimony from the complainant's mother, as well as a counselor from the Cayuga Home for Children, regarding conversations and statements made by the victim regarding the defendant, her father.<sup>305</sup> The victim had become pregnant, and initially lied about the identity of the father, but over time, offered hints to her mother implicating her own father and ultimately revealing the truth to her Cayuga Home for Children counselor.<sup>306</sup> The trial court issued a limiting instruction that such testimony offered by the mother and counselor was not evidence that the defendant did anything wrong, but was offered to explain the conduct of the witness, who did not report the sexual conduct with her father for over two years.<sup>307</sup> The conviction was unanimously affirmed by the Appellate Division, Fourth Department.<sup>308</sup>

The Court of Appeals also affirmed, finding that the trial court did not abuse its discretion in allowing testimony that related to the circumstances and timing of the victim's revelation to her mother and her counselor, because it was offered for the non-hearsay purpose of explaining how such information, developed over time, led to charges against the defendant.<sup>309</sup> Due to the fact that the defense commented on the many missed opportunities for the victim to report the misconduct, and that he attributed her accusations to "the wrath of a troubled girl," the Court held that the jury was properly permitted to consider evidence surrounding the circumstances of the victim's delayed disclosure.<sup>310</sup>

Judge Lippman wrote a concurring opinion, agreeing with the result, but disagreeing with the majority's reasoning, based on the reasoning set forth in his dissent in the companion case, *People v. Ludwig*, also decided by the Court of Appeals on the same day.<sup>311</sup>

In *People v. Ludwig*, the Court of Appeals again addressed the issue of hearsay admitted to explain a child victim's behavior in a sex

---

304. *Id.* at 1016, 21 N.E.3d at 1011, 997 N.Y.S.2d at 350.

305. *Id.* at 1015, 21 N.E.3d at 1010, 997 N.Y.S.2d at 349.

306. *Id.*

307. *Id.* at 1015, 21 N.E.3d at 1010–11, 997 N.Y.S.2d at 349–50.

308. *People v. Cullen (Cullen I)*, 110 A.D. 3d 1474, 972 N.Y.S.2d 792 (4th Dep't 2013).

309. *Cullen II*, 24 N.Y.3d at 1016, 21 N.E.3d at 1011, 997 N.Y.S.2d at 350.

310. *Id.*

311. *See id.* (Lippman, J., concurring); *People v. Ludwig*, 24 N.Y.3d 221, 235, 21 N.E.3d 1012, 1021, 997 N.Y.S.2d 351, 360 (2014) (Lippman, J., dissenting).

abuse prosecution.<sup>312</sup> The defendant in *Ludwig* was convicted of predatory sexual assault against a child.<sup>313</sup> At issue on appeal were certain prior consistent statements by the child-victim that were offered for the non-hearsay purpose of explaining how the sexual abuse came to light.<sup>314</sup> The challenged hearsay testimony came through the complainant's half-brother and her mother.<sup>315</sup>

The victim testified that the defendant abused her in the basement of the defendant's mother's home, where he was living.<sup>316</sup> Her half-brother testified at trial that one day while they were playing in the yard at her mother's home, she let slip that "it smelled like penis in the backyard" and that "she sucked a penis" with her dad.<sup>317</sup> He brought her inside and told their sister, who then informed their mother.<sup>318</sup> The mother testified at trial that when this happened, the victim stood with her fist in her mouth, shaking her head, and when confronted with the brother's statements and asked if they were true, she responded "yes."<sup>319</sup> The mother related the conversation to a friend who contacted the authorities.<sup>320</sup>

The prosecution also called as witnesses an employee of Child Protective Services and an employee of the Catholic Family Center who both testified regarding the demeanor of the victim when they brought up allegations of oral sex,<sup>321</sup> and a pediatrician who specialized in training and evaluating children of sex abuse to explain why a negative physical examination of the victim did not mean there was no abuse, in light of the nature of the abuse.<sup>322</sup> To further explain the child victim's behavior in not immediately reporting the abuse, the prosecution called a social worker to give testimony regarding child sexual abuse accommodation syndrome (CSAAS).<sup>323</sup>

The defendant's only witness at trial was his mother, who attempted to offer testimony of a conversation she overheard involving the victim, in which she allegedly said "she only tells what her mother

---

312. *Ludwig*, 24 N.Y.3d at 223, 21 N.E.3d at 1013, 997 N.Y.S.2d at 352.

313. *Id.* at 229, 21 N.E.3d at 1017, 997 N.Y.S.2d at 356.

314. *Id.* at 223, 21 N.E.3d at 1013, 977 N.Y.S.2d at 352.

315. *Id.* at 225–27, 21 N.E.3d at 1014–15, 977 N.Y.S.2d at 353–54.

316. *Id.* at 224, 21 N.E.3d at 1013, 977 N.Y.S.2d at 352.

317. *Ludwig*, 24 N.Y.3d at 226–27, 21 N.E.3d at 1014–15, 977 N.Y.S.2d at 353–54.

318. *Id.* at 225, 21 N.E.3d at 1014, 977 N.Y.S.2d at 356.

319. *Id.* at 227, 21 N.E.3d at 1015, 977 N.Y.S.2d at 354.

320. *Id.* at 227, 21 N.E.3d at 1016, 977 N.Y.S.2d at 355.

321. *Id.* at 228, 21 N.E.3d at 1016, 977 N.Y.S.2d at 355.

322. *Ludwig*, 24 N.Y.3d at 228, 21 N.E.3d at 1016, 977 N.Y.S.2d at 355.

323. *Id.*

tells she can say.”<sup>324</sup> The victim denied making the statement when confronted with it on cross-examination.<sup>325</sup> The prosecution objected to this testimony through the defendant’s mother, and defendant’s attorney failed to advance any exception to the hearsay rule as a basis for its admission.<sup>326</sup> It was ruled inadmissible hearsay by the trial court.<sup>327</sup>

The conviction was unanimously affirmed on appeal to the Appellate Division, Fourth Department.<sup>328</sup> The Court of Appeals also affirmed, rejecting the argument that the introduction of the victim’s prior consistent statements through the hearsay testimony of her mother and half-brother constituted improper use of a prior consistent statement, also known as “bolstering.”<sup>329</sup> The Court characterized the testimony of the complainant’s half-brother and mother as non-specific with regard to the sexual acts at issue, and as primarily concerned with the victim’s appearance and demeanor when describing and relating the alleged abuse.<sup>330</sup> The Court recognized New York courts have “routinely recognized” that such “nonspecific testimony about [a] child-victim’s reports of sexual abuse [does] not constitute improper bolstering [when] offered for the relevant, nonhearsay purpose of explaining the investigative process and completing the narrative of events leading to the defendant’s arrest.”<sup>331</sup> The Court noted that the challenged testimony was relevant, because the defendant had argued at trial that the complainant was lying because she failed to timely report the alleged sexual misconduct.<sup>332</sup>

The Court also addressed the defendant’s contention that he should have been permitted to introduce through his mother’s testimony the alleged prior inconsistent statement by the complainant that “she only tells what her mother tells she can say.”<sup>333</sup> The Court noted that this statement was objectionable hearsay as it was “plainly offered for its truth.”<sup>334</sup> Furthermore, to the extent defendant offered this testimony for impeachment purposes, the Court found that the impeachment was for a

---

324. *Id.* at 229, 21 N.E.3d at 1016–17, 977 N.Y.S.2d at 355–56.

325. *Id.* at 229, 21 N.E.3d at 1017, 977 N.Y.S.2d at 356.

326. *Id.*

327. *Ludwig*, 24 N.Y.3d at 229, 21 N.E.3d at 1017, 977 N.Y.S.2d at 356.

328. *Id.*

329. *Id.* at 230–31, 21 N.E.3d at 1017–18, 977 N.Y.S.2d at 356–57.

330. *Id.* at 231, 21 N.E.3d at 1018, 977 N.Y.S.2d at 357.

331. *Id.* (citing *People v. Rosario*, 100 A.D.3d 660, 661, 953 N.Y.S.2d 299, 301 (2d Dep’t 2012)).

332. *Ludwig*, 24 N.Y.2d at 232, 21 N.E.3d at 1019, 977 N.Y.S.2d at 358.

333. *Id.* at 233, 21 N.E.3d at 1019, 977 N.Y.S.2d at 358.

334. *Id.* at 233, 21 N.E.3d at 1020, 977 N.Y.S.2d at 359.

collateral issue, and the victim denied making it.<sup>335</sup>

Judge Smith issued an opinion concurring with the result, but finding the result irreconcilable with the Court's prior decisions in *People v. Rosario*<sup>336</sup> and the companion case, *People v. Parada*.<sup>337</sup> In these cases, which were decided together, the Court held inadmissible children's prior consistent statements in cases involving prosecutions for sexual abuse of a child victim.<sup>338</sup> According to Judge Smith, the only "significant difference," between this case and *Rosario* and *Parada* was that in those cases, the prosecution relied upon the "prompt outcry" exception of the hearsay rule, and here the Court reasoned that no exception is necessary because the out-of-court statement was offered not for its truth, but for a non-hearsay purpose of explaining the investigative process to complete the narrative of events.<sup>339</sup> Judge Smith disagreed with this rationale, finding there was no narrative to complete nor investigative process to explain.<sup>340</sup>

Judge Smith noted and approved what he characterized as the Court's new rule in child sex abuse cases, that testimony regarding a victim's out of court disclosure of abuse will be admissible where it is relevant to the victim's credibility.<sup>341</sup> He also provided an "important caveat" that the rule should be limited to prior statements offered through live testimony of a witness, subject to cross-examination.<sup>342</sup>

Chief Judge Lippman issued a strong dissent, opining that the ruling of the majority "eviscerates the hearsay rule" by allowing the admission of prior consistent statements that provide "a narrative" or "investigative purpose" even when the "investigative purpose is not in issue."<sup>343</sup> He noted that as a general rule, out-of-court statements offered in court for the truth of their assertions are hearsay, and "may be received in evidence . . . if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable."<sup>344</sup> Chief Judge Lippman was clearly concerned that the "investigative" or "narrative" rationale could

---

335. *Id.*

336. *Id.* at 233–34, N.E.3d at 1020, 977 N.Y.S.2d at 359.

337. *Ludwig*, 24 N.Y.2d at 233–34, 21 N.E.3d at 1020, 977 N.Y.S.2d at 359.

338. *Id.* at 234, 21 N.E.3d at 1020, 977 N.Y.S.2d at 359.

339. *Id.*

340. *Id.* at 234, 21 N.E.3d at 1020–21, 977 N.Y.S.2d at 359–60.

341. *Id.* at 235, 21 N.E.3d at 1021, 977 N.Y.S.2d at 360.

342. *Ludwig*, 24 N.Y.2d at 235, 21 N.E.3d at 1021, 977 N.Y.S.2d at 360.

343. *Id.*

344. *Id.* at 236, 21 N.E.3d at 1022, 977 N.Y.S.2d at 361 (citing *Nucci v. Proper*, 95 N.Y.2d 597, 602, 744 N.E.2d 128, 130, 721 N.Y.S.2d 593, 595 (2001)).

2016]

**Evidence**

977

have dangerously broad application and allow “wholesale admission of hearsay” in any case where an investigation is in issue.<sup>345</sup> As applied to the facts of this case, Chief Judge Lippman noted that the admission of the half-brother’s and mother’s statements severely prejudiced the defendant because, apart from the complainant, there were no witnesses to the crime or other corroborating evidence.<sup>346</sup>

*E. Hospital Record Entries*

In *Benavides v. City of New York*, the Appellate Division, First Department, held that the trial court improperly admitted into evidence certain entries in the plaintiff’s medical records that described the mechanism of the plaintiff’s injuries as having been caused by a “jump,” rather than being pushed from a fence in the course of a police chase.<sup>347</sup> The plaintiff had sued the City of New York, alleging that during a police chase, the officer in pursuit used excessive force, ultimately pushing him over the fence and causing him injury.<sup>348</sup> At trial, the plaintiff had made a motion in limine to exclude certain entries into the hospital record, including the reference to the plaintiff’s alleged “jump” from a fence as opposed to being pushed.<sup>349</sup> The defendant’s attorneys argued their admissibility, claiming that such evidence was germane to treatment and diagnosis, or alternatively, was a party admission.<sup>350</sup> The trial court permitted the admission of such evidence, and the jury returned a verdict in favor of the defendant.<sup>351</sup>

The appellate division rejected the defendant’s argument that whether the plaintiff was pushed or jumped was germane to treatment, and therefore admissible under the business record exception to the hearsay rule.<sup>352</sup> The court also rejected the defendant’s argument that the statement in the hospital records should be admissible as a party’s admission, finding that the requisite foundational requirements had not been met.<sup>353</sup> The defendant did not sufficiently connect the alleged statement to the plaintiff, as the medical record did not clearly indicate that the statement was made by the plaintiff, although the information was contained in an area on his medical record with a box that was

---

345. *Id.* at 237, 21 N.E.3d at 1022, 977 N.Y.S.2d at 361.

346. *Id.* at 238, 21 N.E.3d at 1023, 977 N.Y.S.2d at 362.

347. 115 A.D.3d 518, 519, 982 N.Y.S.2d 85, 86 (1st Dep’t 2014).

348. *Id.* at 518, 982 N.Y.S.2d at 86.

349. *Id.* at 519, 982 N.Y.S.2d at 86.

350. *Id.* at 519, 982 N.Y.S.2d at 87.

351. *Id.* at 518, 982 N.Y.S.2d at 86.

352. *Benavides*, 115 A.D.3d at 519, 982 N.Y.S.2d at 87.

353. *Id.* at 520, 982 N.Y.S.2d at 87.

checked indicating that the patient was the source of information.<sup>354</sup> Notwithstanding these evidentiary errors, the court determined that the improperly admitted entries were redundant of other evidence, and there was ample evidence to support the jury's verdict that the plaintiff had not been subjected to excessive force by the police department.<sup>355</sup>

#### CONCLUSION

This concludes a review of notable decisions on evidentiary issues by the Court of Appeals and other New York courts. Perhaps one of the most timely may be the Court of Appeals decision in *People v. Durant*, where the Court deferred to the legislature the issue of creating a recognition of a duty on the part of police to record custodial interrogations, but with very urgent and clear language that such a duty should be statutorily mandated, and soon.<sup>356</sup> It remains to be seen how the legislature will respond to this judicial call to action.

---

354. *Id.*

355. *Id.* at 521, 982 N.Y.S.2d at 88.

356. 26 N.Y.3d 341, 353–55, 44 N.E.3d 173, 182–83, 23 N.Y.S.3d 98, 107–08 (2015).