EVIDENCE

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CONTENTS

INTRODUCTION

This year's *Survey* will cover Court of Appeals decisions on evidentiary issues.[1] During the past year, the Court clarified the applicability of *res ipsa loquitur* in surgical malpractice cases involving foreign objects[2] and addressed the hybrid nature of proximate cause

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1. The *Survey* year covered in this Article is from July 1, 2012, to June 30, 2013.

2. *See* James v. Wormuth, 21 N.Y.3d 540, 543-48, 997 N.E.2d 133, 134-38, 974 N.Y.S.2d 308, 309-13 (2013).

evidence in medical malpractice lawsuits as a necessary element of proof for both liability and damages.[3] There were decisions expanding and clarifying the use of expert testimony on child sexual abuse accommodation syndrome in criminal cases,[4] as well as a strong opinion from the Court regarding the unlawfulness of coercive police investigations.[5] These cases, as well as those addressing presumptions, circumstantial evidence, various exceptions to the hearsay rule, and the admissibility of uncharged crimes in criminal cases, are discussed below.

I. BURDEN OF PROOF

In *Oakes v. Patel*, the Court of Appeals reminded practitioners of the importance of burden of proof as an evidentiary concept.[6] The plaintiff in this medical malpractice lawsuit obtained a successful verdict at trial, but moved to set aside the damages as inadequate.[7] The total award was $5.1 million.[8] The trial court granted the plaintiff's motion as to the category of damages, for which the award was $4 million, and ordered a new trial on damages unless the defendants agreed to an increase of the award to $17.4 million.[9] The defendants did not agree, and there was a re-trial on damages.[10]

There were two procedural events that took place between the two trials, neither one of which involved an appeal. The first was that the defendant hospital, Kaleida Health, moved to amend its answer to assert the affirmative defense of release.[11] This was based on a document signed by the plaintiff years earlier—and well before the first trial—in connection with a proof of claim in liquidation proceedings involving one of the hospital's insurers. This motion was denied.[12] The second event was the plaintiff's motion in limine to preclude the defendants from putting forth any proof on the issue of causation. The trial court

3. *See* Oakes v. Patel, 20 N.Y.3d 633, 647, 988 N.E.2d 488, 495, 965 N.Y.S.2d 752, 759 (2013).

4. *See* People v. Williams, 20 N.Y.3d 579, 582, 987 N.E.2d 260, 261, 964 N.Y.S.2d 483, 484 (2013); *see also* People v. Diaz, 20 N.Y.3d 569, 571, 988 N.E.2d 473, 474, 965 N.Y.S.2d 738, 739 (2013).

5. *See* People v. Guilford, 21 N.Y.3d 205, 207, 991 N.E.2d 204, 205, 969 N.Y.S.2d 430, 431 (2013).

6. 20 N.Y.3d at 647-49, 988 N.E.2d at 495-96, 965 N.Y.S.2d at 759-60.

7. *Id.* at 641, 988 N.E.2d at 491, 965 N.Y.S.2d at 755.

8. *Id.* at 641-42, 988 N.E.2d at 491, 965 N.Y.S.2d at 755-56.

9. *Id.* at 641, 988 N.E.2d at 491, 965 N.Y.S.2d at 755.

10. *Id*.

11. *Oakes,* 20 N.Y.3d at 641, 988 N.E.2d at 491, 965 N.Y.S.2d at 755.

12. *Id*.

granted this relief, finding that causation had been determined by the jury at the first trial.[13] It was this second issue that resulted in an order for a third trial.

The defendants took an appeal from the judgment entered after the second trial, in which the jury awarded $16.7 million in damages, in addition to the $1.1 million portion of the first verdict that had been left undisturbed.[14] The Appellate Division, Fourth Department affirmed by a divided court.[15] The majority opinion did not directly address the preclusion of the defendants' proof disputing causation at the retrial. The appellate division granted the defendants leave to appeal to the Court of Appeals, where the evidentiary issue on proximate cause determined the outcome.[16]

A brief description of the facts will help explain the reasoning of the Court, as well as demonstrate the importance of proximate cause evidence on issues of both liability and damages. The plaintiff's claim in *Oakes* was that the defendants failed to properly diagnose and treat a brain aneurism before it ruptured and caused a severe stroke.[17] Several weeks prior to the stroke, the decedent had suffered a persistent headache, for which he was seen by several doctors, one of whom ordered a CT scan.[18] The plaintiff contended this CT scan was either misread or never read, and that if it had been properly read, the aneurism would have been detected, and the stroke and its sequelae prevented.[19] The plaintiff brought suit against the various treating doctors, the hospital where the scan was done, and the medical group that contracted with the hospital to interpret the CT scans. The jury assessed fault on the part of all defendants, with the greatest percentage, seventy-five percent, attributable to the hospital where the CT scan was done.[20]

The Court of Appeals held that, at the damages retrial, the court erred in preventing defendants from contesting which injuries were causally related to the malpractice. The Court noted the hybrid nature of proof of proximate causation in a medical malpractice lawsuit (this is why medical malpractice lawsuits are rarely bifurcated). The plaintiff's burden of proof on liability in a malpractice case is that the alleged

13. *Id*.
14. *Id.* at 641-42, 988 N.E.2d at 491, 965 N.Y.S.2d at 755-56.
15. *Id.* at 642, 988 N.E.2d at 491, 965 N.Y.S.2d at 756.
16. *Oakes*, 20 N.Y.3d at 641-42, 988 N.E.2d at 491, 965 N.Y.S.2d at 755-56.
17. *See id.* at 641-42, 988 N.E.2d at 490-91, 965 N.Y.S.2d at 755-56.
18. *Id.* at 640, 988 N.E.2d at 490, 965 N.Y.S.2d at 755.
19. *Id.* at 640-41, 988 N.E.2d at 490, 965 N.Y.S.2d at 755.
20. *Id*. at 641, 988 N.E.2d at 490, 965 N.Y.S.2d at 755.

malpractice was "a substantial factor in causing the plaintiff's injury".[21] Proof of proximate cause is also an essential component of damages, as the injury or medical condition for which the patient initially sought treatment is almost always not the result of alleged medical malpractice. The plaintiff's damages are limited to those injuries that were proximately caused by the malpractice, and he or she may not recover damages attributable to the natural consequences of the pre-existing condition or injury for which treatment was initially sought.[22]

The defendants' contention on appeal was that, at the damages retrial, they should have been permitted to show that some of the injuries suffered by the decedent were an inevitable consequence of the aneurism that prompted him to seek medical treatment and were not necessarily the result of the alleged malpractice.[23] The Court agreed, noting that, although the jury did find in the first trial that malpractice was a substantial factor in causing the decedent's stroke, upon the retrial of damages, the defendants should have been allowed to attempt to prove that some components of the pain and suffering were not causally related to the malpractice.[24] The burden of proving injuries that were caused by the malpractice was on the plaintiff. In precluding the defendant from offering any evidence to contest causation, the trial court indirectly relieved plaintiff of this evidentiary burden of proof.[25]

Having determined that this was in error, the Court turned its attention to whether such action amounted to reversible error, i.e., whether it had "any practical impact on the case."[26] The Court found that the defendant's expert disclosure decidedly unhelpful and conclusory in helping discern what proof the defendants had intended to offer to dispute causation of particular injuries.[27] However, the Court did note one area of disputed proof at the second trial, where the defendant's attorney contested that a particular injury was caused by the malpractice. The plaintiff had submitted proof of an infected wound in the decedent's groin, which, the Court noted, the defendant challenged as being caused not by the stroke, but as a result of an angiogram, which

21. *Oakes*, 20 N.Y.3d at 647, 988 N.E.2d at 495, 965 N.Y.S.2d at 759 (citing Mortensen v. Memorial Hosp., 105 A.D.2d 151, 158, 483 N.Y.S.2d 264, 270 (1st Dep't 1984)).

22. *Id.* (citations omitted).

23. *See id.* at 647, 988 N.E.2d at 495, 965 N.Y.S.2d at 760.

24. *Id*.

25. *Id.* at 647-49, 988 N.E.2d at 495, 965 N.Y.S.2d at 759.

26. *Oakes*, 20 N.Y.3d at 647-48, 988 N.E.2d at 495, 965 N.Y.S.2d at 760.

27. *Id.* at 648, 988 N.E.2d at 495, 965 N.Y.S.2d at 760.

was necessary, in any event, to diagnose an aneurism.[28] This testimony, elicited by cross-examination of the plaintiff's expert, was stricken by the trial court, and the jury given an instruction not to consider it.[29]

The Court of Appeals found this was reversible error, requiring a retrial on damages related to conscious pain and suffering (but not as to other components of damages). Although this component of the decedent's injuries was minor in comparison with his other more serious injuries, the testimony was graphic, and the Court could not say it had "no significant effect" on the jury's pain and suffering verdict.[30]

The Court in *Oakes* also held that the defendants had failed to properly preserve the issue of the alleged excessiveness of the trial court's additur, reminding that any challenge to additur or remittitur must be appealed prior to a new trial on damages.[31]

The third issue decided by the Court in *Oakes* was whether the defendant hospital's motion to amend its answer to assert the affirmative defense of release should have been granted. The Court first addressed whether it had the power to review the issue on appeal and if an order denying or granting a motion to amend the pleadings was reviewable from a final judgment. In prior cases, the Court had dismissed appeals from orders on motions to amend pleadings, finding that such orders did not "necessarily affect" the final judgment and should properly have been addressed by interlocutory appeal.[32]

Reversing course, the Court abandoned the rule that orders affecting motions to amend are not reviewable on appeal from a final judgment, holding instead that, where an order granting or denying a motion to amend relates to a proposed new pleading that contains a new cause of action or defense, the order necessarily affects the final judgment and it is reviewable.[33] In so doing, the Court specifically overruled its previous decisions in *Best v. Yutaka* and *Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner*.[34]

Having determined the issue to be reviewable on appeal, the Court next addressed whether the proposed amendment, which related to a

28. *Id.*, at 648, 988 N.E.2d at 496, 965 N.Y.S.2d at 760.

29. *Id.* at 648-49, 988 N.E.2d at 496, 965 N.Y.S.2d at 760-61.

30. *Id*. at 649, 988 N.E.2d at 496, 965 N.Y.S.2d at 761.

31. *Oakes*, 20 N.Y.3d at 643, 988 N.E.2d at 492, 965 N.Y.S.2d at 756.

32. *Id.* at 644, 988 N.E.2d at 492, 965 N.Y.S.2d at 757.

33. *Id*. at 644-45, 988 N.E.2d at 493, 965 N.Y.S.2d at 758.

34. *Id*. at 645, 988 N.E.2d at 493, 965 N.Y.S.2d at 758 (citing Best v. Yutaka, 90 N.Y.2d 833, 834, 683 N.E.2d 12, 13, 600 N.Y.S.2d 547, 548 (1997); Arnav Indus., Inc. Ret. Trust v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 N.Y.2d 300, 301, 751 N.E.2d 936, 937, 727 N.Y.S.2d 688, 689 (2001)).

release signed by the plaintiffs in connection with liquidation by the one of the defendant husband's insurance carriers, should have been permitted. The Court held that the trial court properly denied the request to amend as untimely, noting that the defendant hospital did not raise the issue until after the first trial, when liability percentages had been determined by the jury. The Court found that the defendant should have discovered the existence of the releases much earlier, and that to alter the amendment after the first trial would be highly prejudicial to the plaintiff, as it could adversely affect recovery of the verdict against the defendant hospital, who had been determined by the jury to be seventy-five percent responsible for the damages.[35]

II. PRESUMPTIONS AND OTHER EVIDENTIARY SHORTCUTS

A. Res Ipsa Loquitur

Last year's *Survey* addressed two cases in which the doctrine of res ipsa loquitur was invoked in medical malpractice lawsuits, with mixed results.[36] One of those cases, *James v. Wormuth*, was recently affirmed by the Court of Appeals in a unanimous decision written by Judge Rivera.[37] The alleged malpractice in *James* involved the failure to remove a guide wire that had broken off and became lost during a biopsy of the plaintiff's lung. The defendant surgeon testified that he was aware that the wire dislodged, but he was unable to locate it after a twenty-minute search. At that point, he decided that it was better to leave the wire behind and end the procedure, rather than extend the amount of time the patient was in surgery and continue the search. The surgeon informed the plaintiff after the surgery that the wire had been left behind because he thought it was safer to do so. In the weeks following the surgery, the plaintiff experienced problems that she believed were caused by the wire. As a result, the surgeon removed the wire during a second surgery two months later. [38]

At trial, the plaintiff relied exclusively on res ipsa loquitur as a theory of liability and did not introduce any expert testimony. Upon the defendant's motion, the trial court dismissed the plaintiff's case at the close of her proof for failure to establish a prima facie case of medical malpractice. The defendant had argued that exert testimony was

35. *Id.* at 645-47, 988 N.E.2d at 493-95, 965 N.Y.S.2d at 758-59.

36. *See generally* Backus v. Kaleida Health, 91 A.D.3d 1284, 937 N.Y.S.2d 773 (4th Dep't 2012); James v. Wormuth, 93 A.D.3d 1290, 941 N.Y.S.2d 388 (4th Dep't 2012).

37. 21 N.Y.3d 540, 548, 997 N.E.2d 133, 138, 974 N.Y.S.2d 308, 313 (2013).

38. *Id.* at 543-44, 997 N.E.2d at 134, 974 N.Y.S.2d at 309.

required and, without it, the doctrine of res ipsa loquitur was inapplicable because there was no evidence that negligence on the part of the defendant caused the wire to become dislodged. As reported last year, the Appellate Division, Fourth Department affirmed, in a three to two decision.[39]

On appeal to the Court of Appeals, the plaintiff argued that expert testimony was unnecessary because the fact that the wire was left behind itself establishes liability, and further that the wire should be treated as a foreign object from which negligence may be inferred.[40] In reaching its decision, the Court considered the plaintiff's arguments in the context of whether they comported with the elements of a prima facie case of negligence in support of a res ipsa loquitur charge, which include: "(1) the event . . . [is one] that ordinarily does not occur in the absence of . . . negligence; (2) it must be caused by an . . . instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action . . . on the part of the plaintiff."[41]

The Court also took note that, in medical malpractice cases based upon foreign objects, res ipsa loquitur is available where a foreign object is unintentionally left behind during surgery.[42] The doctrine is not applicable in cases when a foreign object is intentionally left behind, unless there is expert testimony that it was negligent to do so.[43] Applying these principles, the Court in *James* affirmed the judgment of dismissal, observing that the plaintiff's entire case rested upon a theory that the defendant doctor intentionally chose to leave the wire behind. Establishing a prima facie case required expert testimony that it was a deviation from the applicable standards of practice to do so. Because the plaintiff did not present such proof, she failed to satisfy the first element for a prima facie case of negligence in support of res ipsa loquitur, i.e., that the event was not one which occurs in the absence of negligence.[44]

The Court found that the plaintiff also failed to establish the second element of res ipsa loquitur that the defendant had exclusive control of the injury-causing instrumentality. The defendant physician testified

39. *Id.* at 544-45, 997 N.E.2d at 135, 974 N.Y.S.2d at 310.

40. *Id*. at 545, 997 N.E.2d at 136, 974 N.Y.S.2d at 311.

41. *Id*. at 546, 997 N.E.2d at 136, 974 N.Y.S.2d at 311 (citing, Kambat v. St. Francis Hosp., 89 N.Y.2d 489, 494, 678 N.E.2d 456, 458, 655 N.Y.S.2d 844, 846 (1997)).

42. *James*, 21 N.Y.3d at 546, 997 N.E.2d at 136, 974 N.Y.S.2d at 311 (citations omitted).

43. *See id.* (citations omitted).

44. *Id*. at 547, 997 N.E.2d at 137, 974 N.Y.S.2d at 312.

that there were other medical personnel who handled the wire during the surgery prior to the doctor's discovery that it had been dislodged. Upon such evidence, the Court found that it was not sufficient, as the plaintiff contended, to show that the doctor was in control of the operation.[45]

The lesson here is twofold: (1) the doctrine of res ipsa loquitur in a surgical case requires exclusive control over the injury-causing instrumentality by the surgeon; and (2) expert testimony is generally required to establish a prima facie res ipsa case when a foreign object is left behind, in particular where the surgeon testifies that it was an exercise of his judgment to decide to do so.

B. Presumptions

Presumptions all serve as shortcuts. In certain circumstances, they operate to lessen a burden of proof. In others, they remove or relieve the evidentiary foundation necessary for the admission of a particular type of evidence. During the past year, the Court of Appeals had occasion to address both types of these presumptions.

An example of a presumption operating as a burden of proof was addressed by the Court in *In re Granger v. Misercola*.[46] There, the petitioner inmate in New York's correctional system was seeking visitation after the respondent mother refused to bring his child to prison. Family court granted the petition and awarded the petitioner periodic visits with the child, who was three years old at the time. This decision was affirmed by the appellate division.[47]

On appeal, the respondent mother challenged the legal standard employed by the lower court, which was the rebuttable presumption in custodial arrangements that a non-custodial parent will be granted visitation in the absence of proof of harm. She argued that this was not the correct standard, and was contrary to the Court's holding in *Tropea v. Tropea*, where the Court used language rejecting a mechanistic application of presumptions in a case involving judicial approval of a relocation plan by a custodial parent.[48]

The Court in *Granger* clarified its holding in *Tropea*, reiterating that the proper starting point for custody or visitation is the rebuttable presumption that a non-custodial parent will be granted visitation, even

45. *Id*. at 548, 997 N.E.2d at 137-38, 974 N.Y.S.2d at 312-13.

46. 21 N.Y.3d 86, 92, 990 N.E.2d 110, 113, 967 N.Y.S.2d 872, 875 (2013).

47. *Id*. at 92, 990 N.E.2d at 114, 967 N.Y.S.2d at 876.

48. *Id*. at 90, 990 N.E.2d at 112, 967 N.Y.S.2d at 874 (citing Tropea v. Tropea, 87 N.Y.2d 727, 740, 665 N.E.2d 145, 151, 642 N.Y.S.2d 575, 581 (1996)).

when the parent seeking visitation is in prison.[49] To overcome this presumption requires a showing by a preponderance of the evidence that visitation would be harmful to the child or that the right to visitation had been forfeited. Under these principles, the Court found that the lower court applied the correct legal standard and that the respondent failed to rebut the presumption that visitation would be harmful to the child. The order approving visitation was affirmed.[50]

The statutory presumption that title to real property is transferred upon delivery of the deed was addressed by the Court of Appeals in *M&T Real Estate Trust v. Doyle*.[51] The presumption arose in connection with the transfer of title in mortgage foreclosure proceedings. The plaintiff bank had foreclosed on commercial properties, and then purchased the property at public auction for considerably less than the foreclosed amount. In the months following the sale, the plaintiff's attorney twice returned the referee's deed, seeking to delay delivery until it had secured its own purchaser. Once this had been accomplished, the plaintiff's attorney accepted the deed, and it was recorded in the county clerk's office.[52]

The plaintiff bank then filed a motion seeking a deficiency judgment. The defendants opposed the motion as untimely because it was brought more than ninety days after the original delivery of the deed, which was the time period specified by Real Property Actions and Proceedings Law section 1371(2). The plaintiff countered that the operative event was acceptance of the deed, not the date of the original delivery of the deed, which was twice rejected and returned. Because the motion was made within ninety days of acceptance and recording, the plaintiff argued its motion was timely. The lower court agreed and granted the plaintiff's motion. The Appellate Division, Fourth Department reversed, holding that the plaintiff's motion was untimely.[53]

In proceedings below and before the Court of Appeals, the analysis turned upon the interpretation of the statutory presumption created by Real Property Law section 244 to the effect that consummation of a sale is presumed upon delivery of a deed.[54] The Court found that the statute creates a presumption of delivery upon transfer to a purchaser. Such a presumption was rebuttable and, in this case, upon evidence that the

49. *Id.* at 90-91, 990 N.E.2d at 112, 967 N.Y.S.2d at 874.
50. *Id.* at 92, 990 N.E.2d at 114, 967 N.Y.S.2d at 876.
51. 20 N.Y.3d 563, 987 N.E.2d 257, 964 N.Y.S.2d 480 (2013).
52. *Id*. at 566, 987 N.E.2d at 258, 964 N.Y.S.2d at 481.
53. *Id*. at 566-67, 987 N.E.2d at 258-59, 964 N.Y.S.2d at 481-82.
54. *Id*. at 567-68, 987 N.E.2d at 259-60, 964 N.Y.S.2d at 482-83.

plaintiff's attorney declined to accept or retain physical possession of the referee's deed originally dated May 11, 2010. Finding plaintiff's motion was therefore timely, the order of the appellate division was reversed and judgment in favor of the plaintiff reinstated.[55]

In *Roth v. City of Syracuse*, the Court was called upon to address whether the plaintiff's proof of the presence of lead paint in residential rental properties should have been considered by the trial court as sufficient to rebut the presumption of validity of market value by the defendant taxing authority.[56] In the proceedings below, the plaintiff property owner offered evidence through an expert that the value of his rental properties was considerably less than the assessed value because they were contaminated with lead paint. The trial court rejected the plaintiff's expert testimony and other proof and denied his petition challenging his tax assessments. This decision was unanimously affirmed by the Appellate Division, Fourth Department.[57]

The Court of Appeals agreed that the petitioner's proof did not rise to the level of "substantial evidence" sufficient to overcome the presumption of validity of market value as determined by the defendant. Although the plaintiff's expert appraiser evaluated the properties as having a negative market value because of the lead paint, this was insufficient to overcome the fact that the plaintiff failed to show he actually suffered economic harm as a result. During the relevant time period, he continued to profit from rental income generated by the five properties at issue and had not abated any of the lead paint. This, the Court reasoned, did not amount to "substantial evidence" of decreased market value sufficient to overcome the presumption of validity.[58]

In *American Building Supply Corp. v. Petrocelli Group, Inc.*,[59] the Court decided the issue of whether there is a conclusive presumption that an insured is presumed to have read his or her policy of insurance upon receipt, and whether this presumption operates to bar a claim against his broker for failure to procure insurance as requested. The Court, holding in favor of the plaintiff and reversing the order granting summary judgment below, held that there is no such conclusive presumption, but rather the alleged failure to read the policy goes to the issue of comparative negligence and does not bar a suit in negligence

55. *Id.* at 568, 987 N.E.2d at 260, 964 N.Y.S.2d at 483.
56. 21 N.Y.3d 411, 414, 995 N.E.2d 123, 124, 972 N.Y.S.2d 161, 162 (2013).
57. *Id.* at 414-16, 995 N.E.2d at 125-26, 972 N.Y.S.2d at 163-64.
58. *Id.* at 417-19, 995 N.E.2d at 126-28, 972 N.Y.S.2d at 164-66.
59. 19 N.Y.3d 730, 733, 979 N.E.2d 1181, 1183, 955 N.Y.S.2d 854, 856 (2012).

against a broker.[60] There was a fairly strong dissent by Judge Pigott, who pointed out that the majority holding was contrary to prior precedent, specifically *Metzger v. Aetna Insurance Company*.[61]

The Court recognized a new presumption in *People v. Lee*.[62] The issue raised by the defendant was whether the trial court abused its discretion in denying his request that a court interpreter be removed. At trial, prior to the testimony of the complainant wife, who was Cantonese-speaking, the court had arranged for a court interpreter to translate her testimony into English. The interpreter brought to the court's attention the fact that he knew the complainant husband, and his father had done business with him.[63] The trial court permitted defense counsel to voir dire the interpreter on this issue of bias, but denied his request for a new interpreter. The defendant was convicted of burglary and grand larceny. The appellate division affirmed, finding that the interpreter, a career court employee, was fully aware of his oath to translate verbatim and accurately, and furthermore, he testified that he had no personal knowledge of the facts of the case.[64]

The Court of Appeals affirmed, finding the trial court did not abuse its discretion in declining to remove the interpreter, and further that there was a presumption that the interpreter was aware of his ethical and professional obligations to translate the testimony verbatim, and that this presumption was not overcome by the facts of this case, where the danger the interpreter would distort complainant wife's testimony was remote, and he possessed no personal knowledge of the facts of this case.[65] There was a lengthy dissent by Judge Rivera, who characterized the presumption in favor of official court reporters as an "irrebutable presumption in favor of official court reporters under oath, regardless of potentially compromising circumstances."[66] Judge Rivera believed the trial court should have taken sufficient steps to insure the accuracy of the interpretation and provide a mechanism to preserve the interpretation for review on any subsequent challenge.[67]

60. *Id.* at 733-36, 979 N.E.2d at 1183-85, 955 N.Y.S.2d at 856-58.

61. *Id*. at 737-38, 979 N.E.2d at 1185-86, 955 N.Y.S.2d at 858 (Pigott, J., dissenting) (citing Metzger v. Aetna Ins. Co., 227 N.Y. 411, 416, 125 N.E. 814, 816 (1920)) (stating insured is "conclusively presumed" to know the contents of an insurance contract at the time he accepts it).

62. 21 N.Y.3d 176, 178, 991 N.E.2d 692, 693, 969 N.Y.S.2d 834, 835 (2013).

63. *Id.* at 178, 991 N.E.2d at 693, 969 N.Y.S.2d at 835.

64. *Id*. at 178-79, 991 N.E.2d at 693-94, 969 N.Y.S.2d at 835-36.

65. *Id*. at 179-80, 991 N.E.2d at 694, 969 N.Y.S.2d at 836.

66. *Id*. at 182, 991 N.E.2d at 696, 969 N.Y.S.2d at 838 (Rivera, J., dissenting).

67. *Lee*, 21 N.Y.3d at 183, 991 N.E.2d at 697, 969 N.Y.S.2d at 839 (Rivera, J., dissenting).

C. Collateral Estoppel

Collateral estoppel is another evidentiary shortcut affording preclusive effect to material issues or elements of claims and defenses. The Court had occasion to consider the collateral estoppel effect of an A*lford* plea[68] in *Howard v. Stature Electric, Inc*.[69] The respondent employer in *Howard* was seeking to preclude the plaintiff from receiving any additional workers' compensation benefits because he had been convicted of insurance fraud in connection with misrepresentations made at a workers' compensation hearing. The plaintiff had pled guilty by entering an A*lford* plea, that is, without an admission of wrongdoing. There was no factual allocution made at the time he pled guilty when he was sentenced to an agreed-upon conditional discharge with restitution.[70]

The question before the Court of Appeals was whether the claimant's A*lford* plea should be given preclusive effect in the subsequent workers' compensation proceeding. The Court held that an A*lford* plea may be used like any other conviction as a predicate for civil and criminal penalties. It may also be used to have preclusive effect, but only when two factors are satisfied: (1) identity of issues in the prior and subsequent proceedings; and (2) whether the party attempting to relitigate the issue had a full and fair opportunity to contest it in the prior proceeding.[71] The first of these two factors was not met in *Howard*, as the plea colloquy in connection with the fraud conviction included no reference to facts underlying the conviction, so it was impossible to determine the identity of issues.[72] As with all issues regarding collateral estoppel, the party asserting it has the burden of establishing the requisite factors have been met.[73]

III. CIRCUMSTANTIAL EVIDENCE

Circumstantial evidence, loosely defined, is evidence from which facts may be inferred. Many occurrences and crimes are unwitnessed, and proof of facts is most often done through reliable forms of circumstantial evidence. In *Galetta v. Galetta*,[74] the Court of Appeals addressed circumstantial evidence in the form of testimony regarding

68. North Carolina v. Alford, 400 U.S. 25, 26 (1970).
69. 20 N.Y.3d 522, 524, 986 N.E.2d 911, 912, 964 N.Y.S.2d 77, 78 (2013).
70. *Id.* at 524-25, 986 N.E.2d at 913, 964 N.Y.S.2d at 79.
71. *Id.* at 525, 986 N.E.2d at 913-14, 964 N.Y.S.2d at 79-80.
72. *Id*. at 525-26, 986 N.E.2d at 914, 964 N.Y.S.2d at 80.
73. *Id*. at 525, 986 N.E.2d at 914, 964 N.Y.S.2d at 80.
74. 21 N.Y.3d 186, 197, 991 N.E.2d 684, 691, 969 N.Y.S.2d 826, 833 (2013).

custom and practice. Such evidence is often offered to fill evidentiary gaps, for example, when a witness fails to have a specific recollection as to an event.

The Court noted in *Galetta* that

> [c]ustom and practice evidence draws its probative value from the repetition and unvarying uniformity of the procedure involved as it depends on the inference that a person who regularly follows a strict routine in relation to a particular repetitive practice is likely to have followed the same strict routine at a specific date or time relevant to the litigation.[75]

At issue was an alleged defective acknowledgement of a prenuptial agreement. The agreement had been prepared by the defendant's attorney, and the plaintiff elected to proceed without an attorney. The certificates of acknowledgement relating to the various parties' signatures appeared almost identical, except that the acknowledgment related to the defendant husband's signature did not include the language attesting that the notary verified the identity of the signatory.[76]

In seeking to enforce the prenuptial agreement, the husband contended that the language of the acknowledgement was in substantial compliance with the requirements of Real Property Law section 263(B)(3), which required that the acknowledgement be a form acceptable for the recording of deeds.[77] The husband's certificate of acknowledgement did not state that the notary public knew the husband or had otherwise ascertained and confirmed his identity. In the proceedings below, the husband submitted an affidavit from the notary, attempting to cure what appears to have been a typographical error in one of the acknowledgments. The issue before the Court was whether a party can cure a defective acknowledgement.[78]

After reviewing applicable caselaw, the Court in *Galetta* did not directly answer the question, but did crack the door to a cure opportunity for a defective acknowledgement where the proof sufficiently establishes the notary's custom and practice. Unfortunately for the defendant husband in *Galetta*, his proof did not pass muster, as the notary's affidavit did not describe his custom and practice with the requisite degree of specificity.[79] The notary simply maintained that it was his custom and practice to ask and confirm the identity of the

75. *Id*. at 197-98, 991 N.E.2d at 691, 969 N.Y.S.2d at 833.
76. *Id.* at 189-90, 193, 991 N.E.2d at 686-88, 969 N.Y.S.2d at 827-28, 830.
77. *Id*. at 190, 991 N.E.2d at 686, 969 N.Y.S.2d at 828.
78. *Id*. at 190-91, 991 N.E.2d at 686, 969 N.Y.S.2d at 828.
79. *Galetta*, 21 N.Y.3d at 197-98, 991 N.E.2d at 692, 969 N.Y.S.2d at 834.

person signing the document and that he was "confident" he had done so when witnessing the husband's signature. He did not say how he routinely confirmed the identity of the signatory, such as requiring that he produce a form of photographic identification or other facts verifying identity. In short, he failed to describe a strict routine that he used each and every time with "unvarying uniformity."[80]

Under such proof, the Court in *Galetta* determined the plaintiff was entitled to summary judgment declaring the prenuptial agreement unenforceable.[81] The evidentiary lesson here is that establishing custom and practice requires a greater degree of detail and specificity as to the nature of the routine, the regularity with which it was performed, and other substantiating facts establishing that the routine was more likely than not followed to its intended purposes.

IV. EXPERT TESTIMONY

In two cases decided the same day, both decisions authored by Judge Pigott, the Court of Appeals alternatively expanded and refined the use of expert testimony in the field of child sexual abuse accommodation syndrome ("CSAAS").[82] In *People v. Williams*, the Court held that it was permissible for a CSAAS expert to testify regarding the behavior of sexual abusers, as it would aid the jury in understanding the victims' unusual behavior.[83] This holding represented an expansion of the well-accepted use of expert testimony regarding abused child syndrome, which typically was limited to victim behavior patterns, to also explain unusual behavior of the abusers, insofar as it affected the behavior of the victims.[84]

The defendant in *Williams* had been charged with sex crimes involving two twelve-year-old girls. At trial, the prosecution called an expert on CSAAS who testified, as required, that he did not interview the complainant and was not going to be rendering opinions specific to the facts of the case. He would be testifying about the general topic of CSAAS and its five stages. However, his testimony covered not only behaviors of the victims, as is the norm, but also addressed behaviors of the abuser, including the grooming process. He was posed hypothetical questions by the prosecution with facts mirroring that of the victim's

80. *Id*. at 197-98, 991 N.E.2d at 691-92, 969 N.Y.S.2d at 833-34.

81. *Id*. at 198-99, 991 N.E.2d at 692, 969 N.Y.S.2d at 834.

82. *See* People v. Williams, 20 N.Y.3d 579, 584, 987 N.E.2d 260, 263, 964 N.Y.S.2d 483, 486 (2013); People v. Diaz, 20 N.Y.3d 569, 575-76, 988 N.E.2d 473, 476, 965 N.Y.S.2d 738, 741 (2013).

83. 20 N.Y.3d at 584, 987 N.E.2d at 263, 964 N.Y.S.2d at 486.

84. *Id*.

testimony at trial and was specifically asked if such facts were consistent with CSAAS syndrome. The trial court overruled the defendant's objection to such testimony, and the defendant was found guilty on all counts. The verdict was affirmed by the appellate division.[85]

The Court of Appeals was asked to address whether the expert testimony on CSAAS improperly exceeded the proper scope of such testimony by addressing the specific facts in the case and serving to bolster the victim's testimony.[86] In reaching its holding, the Court referenced its recent decision in *People v. Spicola*,[87] where the Court held that expert testimony regarding CSAAS could be used to rehabilitate the complainant's credibility by offering an explanation why the victim would repeatedly return to the perpetrator's home and delayed many years in reporting the abuse.[88]

Although the Court in *Williams* expanded the scope of CSAAS expert testimony to include general background as to typical perpetrator as well as victim behavior, the expert's testimony in *Williams* was found to have crossed a line because of the extent to which the prosecution's hypothetical questions mirrored the facts in that case.[89] This testimony included the following, recited by the Court in its decision:

> Now, Doctor, is it consistent with the syndrome of a child living in her own home with a man who is her mother's live-in boyfriend, is it consistent with a syndrome that this man would have this child straddle him, that this child would not call out to another child similar in age who is sleeping in the very next room?[90]

One may glean from this that the degree of detail was so precise as to have crossed the bounds from the permissible to the impermissible. However, this evidentiary error was deemed to be harmless and not warranting reversal of the conviction in light of overwhelming evidence of defendant's guilt.[91]

This very issue, when an expert's testimony becomes impermissibly too case specific, was addressed by the Court in *People*

85. *Id*. at 582-83, 585, 987 N.E.2d at 262, 264, 964 N.Y.S.2d at 484-85, 487.

86. *Id.* at 584, 987 N.E.2d at 263, 964 N.Y.S.2d at 486.

87. *Id*. (citing People v. Spicola, 16 N.Y.3d 441, 922 N.Y.S.2d 846, 947 N.E.2d 620 (2011), *cert. den*., 132 S. Ct. 400 (2011)).

88. *Williams*, 20 N.Y.3d at 584, 987 N.E.2d at 263, 964 N.Y.S.2d at 486.

89. *Id.* at 584, 987 N.E.2d at 263, 964 N.Y.S.2d at 486.

90. *Id*. at 583, 987 N.E.2d at 262, 964 N.Y.S.2d at 485.

91. *Id*. at 585, 987 N.E.2d at 263, 964 N.Y.S.2d at 486.

v. Diaz.[92] The Court in *Diaz* held that the CSAAS expert's testimony regarding behavior of sexual abusers as well as child victims was permissible under the newly established rule set forth in *Williams,* and although some of the hypotheticals posed to the prosecution's expert described behavior similar to that of the complaining victim, the expert testified in sufficiently general terms that it was properly admitted into evidence.[93]

Judge Rivera, in her concurring opinion in *Diaz*, took issue with this aspect of the Court's holding, finding that the expert's testimony "crossed the line" in describing the abuser's conduct in terms factually similar to that described in the victim's testimony.[94] She pointed out that the expert's testimony referenced the use of pornography and escalation of physical intimacy, which bolstered the victim's testimony that her physical encounters with the defendant increased in intimacy over time. Judge Rivera's concurrence highlights the difficulty of discerning the difference between permissible and impermissibly suggestive testimony.[95]

The second issue decided by the Court in *People v. Diaz* was whether the trial court erred in refusing to admit evidence of the complainant's prior false allegations of sexual abuse.[96] The Court found that this was reversible error because such evidence went to the material issue of whether the complainant had a history of making false allegations of abuse by family members and, if admitted, would have diminished the credibility of the complainant. In reaching its holding, the Court reiterated that evidence of a victim's prior false allegations of sexual abuse is not inadmissible as a matter of law, but rather may be admissible if the prior allegations suggest a pattern directly relevant to the charges.[97]

V. PAROL EVIDENCE

The parol evidence rule has both evidentiary and substantive implications. It operates generally to preclude evidence outside the four corners of a written document to explain, interpret, amend, or alter its contents. In the evidentiary context, it is the trial court who must ultimately determine whether, under the circumstances, an exception to

92. 20 N.Y.3d 569, 576, 988 N.E.2d 473, 476-77, 965 N.Y.S.2d 738, 741 (2013).
93. *Id.* at 575-76, 988 N.E.2d at 476, 965 N.Y.S.2d at 741.
94. *Id*. at 577, 988 N.E.2d at 477, 965 N.Y.S.2d at 742.
95. *Id*. at 577, 988 N.E.2d at 477-78, 965 N.Y.S.2d at 742-43.
96. *Id.* at 575, 988 N.E.2d at 476, 965 N.Y.S.2d at 741.
97. *Diaz*, 20 N.Y.3d at 576, 988 N.E.2d at 476-77, 965 N.Y.S.2d at 741-42.

the parol evidence rule should be permitted and such oral or written evidence considered by the trier of fact. New York courts have generally afforded fairly strict enforcement of the parol evidence rule, recognizing that the best evidence of the parties' intentions and agreement is the document signed by the parties to be charged.

This past year, the Court of Appeals had occasion to address the parol evidence rule in *Schron v. Troutman Sanders, LLP*,[98] a case involving enforcement of an option to purchase contract. The plaintiff in *Schron* was a commercial real estate investor seeking specific performance of an option contract. In a joint venture, the plaintiff and the defendant acquired a publicly held nursing home company, with the plaintiff investing $1.3 billion and retaining title to the real estate, and the defendant assuming the role of nursing home operator through a corporate entity created for that purpose. The defendant did not contribute any funds to the buyout of the publicly held nursing home business.[99]

In connection with the underlying transaction, the plaintiff received an option to acquire 99.999% of the ownership of the defendant entity, SV Care, which was created to operate the nursing home business.[100] According to the option agreement, the consideration given by the defendant for the option was "the mutual covenants and agreements hereinafter set forth, and other good and valuable consideration (the receipt and adequacy of which is hereby acknowledged by the Parties)."[101] The option was exercisable upon the plaintiff paying $100 million, with the further proviso that, in the event that the option was exercised and the company later sold, the plaintiff could retain no more than $400 million of the proceeds, with the remaining monies payable to the defendant operating company, SV Care.[102] This option agreement contained a merger clause, specifically providing, as is the norm, that "[t]his agreement contain[s] the entire agreement and understanding of the Parties."[103]

There was a second contract related to the underlying acquisition of the publicly held nursing home business, a loan agreement under which one of the plaintiff's corporate entities agreed to lend $100 million to the defendant SV Care for the purpose of capitalization. Both

98. 20 N.Y.3d 430, 432, 986 N.E.2d 430, 431, 963 N.Y.S.2d 613, 614 (2013).
99. *Id*. at 432-33, 986 N.E.2d at 431, 432, 963 N.Y.S.2d at 614, 615.
100. *Id.*
101. *Id*.
102. *Id*. at 433, 986 N.E.2d at 431-32, 963 N.Y.S.2d at 614-15.
103. *Schron*, 20 N.Y.3d at 433, 986 N.E.2d at 432, 963 N.Y.S.2d at 615.

the loan agreement and the option contract were executed as part of a refinancing of the underlying transaction.[104]

There ensued a great deal of litigation among the parties. Relevant to the issue on appeal in *Schron* was the specific performance of the option agreement. The defendant contended that the loan agreement was part of the consideration for the option agreement and that there was a failure of such consideration, as the $100 million loan had not been made.[105] Plaintiff objected to the admissibility of the loan agreement, moving in limine for exclusion of any parol evidence to be introduced to show that the loan agreement was part of the consideration or the option agreement.[106] The plaintiff was successful in proceedings before the supreme court, and on defendant's appeal to the Appellate Division, the First Department.[107]

Notwithstanding the complexity of the underlying transaction, the ancillary agreements, and the litigation that ensued, the Court of Appeals in *Schron* returned to black letter law applicable to the parol evidence rule.[108] The Court noted that option contracts are no different than any other contract and that parol evidence "is admissible only if a court finds an ambiguity in a contract." [109] The Court also noted that where, as here, there was a merger clause, it reflected the parties' express intent to bar parol evidence or extrinsic evidence of any kind for that matter as to vary, amend, alter or change the terms of the writing.[110] The Court also expressly found that the recital of consideration as "other good and valuable consideration" was not so vague and ambiguous as to render the option contract incomplete.[111] The Court noted that, if these sophisticated investors intended to make a $100 million loan payment a condition to the enforceability of the option, they certainly could have so provided in their agreements. Their failure to do so was fatal to the defendant's attempt to introduce parol evidence, which would have substantially changed the terms of the option contract.[112]

As a side note, the Court's decision reflects that, in other related proceedings below, the supreme court determined that the plaintiff had

104. *Id.* at 434, 986 N.E.2d at 432, 963 N.Y.S.2d at 615.
105. *Id*.
106. *Id*.
107. *Id*. at 434-35, 986 N.E.2d at 432, 963 N.Y.S.2d at 615.
108. *Schron*, 20 N.Y.3d at 436, 986 N.E.2d at 433, 963 N.Y.S.2d at 616.
109. *Id*.
110. *Id.* at 436, 986 N.E.2d at 433-34, 963 N.Y.S.2d at 616.
111. *Id*. at 436-37, 986 N.E.2d at 434, 963 N.Y.S.2d at 617.
112. *Id*. at 437, 986 N.E.2d at 434, 963 N.Y.S.2d at 617.

in fact funded the $100 million loan to defendant SV Care pursuant to the loan agreement. However, since this matter was on appeal before the Appellate Division, First Department, the Court determined that the issue was not moot.[113]

VI. EVIDENCE OF UNCHARGED CRIMES

In *People v. Molineaux*,[114] decided over 100 years ago, the Court of Appeals issued a landmark decision setting forth the grounds under which evidence of uncharged crimes and "bad acts" may be admissible at a criminal trial against the defendant. The *Molineaux* Rule, as it came to be known, generally provides that, under certain circumstances, evidence of uncharged crimes is admissible when relevant on the issues of (1) motive; (2) intent; (3) eliminating the possibility of mistake or accident; (4) establishing that the alleged crime was part of a common plan or scheme; or (5) confirming the identity of the alleged perpetrator.[115] In *Molineaux,* the Court recited the rule at English common law that the prosecution "cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding in the proofs that he is guilty of the crime charged."[116] The noted exceptions to this rule, as set forth in *Molineaux,* have since generated a steady stream of appeals to the Court of Appeals.

One such case during the past year was *People v. Alfaro*, where the defendant appealed his conviction of robbery, assault, and gang assault.[117] The prosecution's theory at trial was that the defendant, along with two accomplices, assaulted the complainant in the lobby of a building in New York City. When the assailants were apprehended by police, they discovered a cigarette lighter crafted to look like a firearm on the defendant's person, as well as a pair of imitation handcuffs on the ground where the defendant was apprehended.[118] Upon a search of the defendant's pockets at the precinct, police recovered a pair of handcuff keys.[119] Prior to trial, the defendant moved to preclude the admission of the novelty handcuffs, keys, and the imitation firearm on grounds that they were not used during the commission of the alleged

113. *Schron*, 20 N.Y.3d at 433, 986 N.E.2d at 436, 963 N.Y.S.2d at 616.

114. 168 N.Y. 264, 61 N.E. 286 (1901).

115. *Id*. at 294, 61 N.E. at 294.

116. *Id*. at 291, 61 N.E. at 293 (citing JOEL P. BISHOP, NEW CRIMINAL PROCEDURE VOL. 1 (Chicago, T.H. Flood 1895)).

117. 19 N.Y.3d 1075, 979 N.E.2d 1152, 955 N.Y.S.2d 826 (2012).

118. *Id.* at 1075, 979 N.E.2d at 1152, 955 N.Y.S.2d at 826.

119. *Id*.

assault and robbery and, therefore, were prejudicial propensity evidence in violation of *Molineaux*.[120] The motion was denied by the trial court, the evidence came in, and the judgment of conviction affirmed by the Appellate Division, First Department.[121]

In a memorandum decision, the Court of Appeals also rejected the defendant's arguments, finding that, even if the subject items constituted evidence of uncharged crimes under *Molineaux*, because they were recovered on the defendant's person shortly after the incident, they "completed the narrative of this particular criminal transaction" and were probative of the issue at trial of intent to threaten or use physical force upon another person during a commission of a robbery.[122] The Court also noted that, even if the admission of such evidence was error, it was harmless in light of overwhelming proof that the defendant was an assailant. The Court distinguished this case from *People v. Gillyard*,[123] relied upon by the defendant. In *Gillyard,* the defendant was convicted of criminal impersonation of a police officer. Evidence of handcuff keys was held improperly admitted because possession of the handcuffs was not probative of intent to use force in the commission of a crime, but rather to make the police impersonation more realistic.[124]

There was a lengthy dissent by Chief Judge Lippman, who would have reversed on grounds that admission of this evidence was in error and was used for an improper purpose by the prosecution at trial, suggesting that robbery was the defendant's line of work.[125]

In another case addressing *Molineaux,* the Court in *People v. Bradley,* by a majority opinion from Chief Judge Lippman, reversed the defendant's manslaughter conviction and ordered a new trial because the trial court had impermissibly allowed into evidence testimony from a social worker that, ten years earlier, the defendant had stabbed another man in the thigh.[126] The prosecution offered the evidence on the issue of the defendant's state of mind, i.e., that she was angry toward men, to

120. *Id*.

121. *Id*.

122. *Alfaro*, 19 N.Y.3d at 1075, 979 N.E.2d at 1153, 955 N.Y.S.2d at 826 (citing People v. Till, 87 N.Y.2d 835, 661 N.E.2d 153, 637 N.Y.S.2d 681 (1995); People v. Resek, 3 N.Y.3d 385, 821 N.E.2d 108, 787 N.Y.S.2d 683 (2004); People v. Wilkinson, 71 A.D.3d 249, 892 N.Y.S.2d 535 (2d Dep't 2010)).

123. *Id.* at 1077, 979 N.E.2d at 1154, 955 N.Y.S.2d at 826 (citing People v. Gillyard, 13 N.Y.3d 351, 920 N.E.2d 344, 892 N.Y.S.2d 288 (2009)).

124. *Gillyard*, 13 N.Y.3d at 353, 356, 920 N.E.2d at 345, 347, 892 N.Y.S.2d at 289, 291.

125. *Alfaro*, 19 N.Y.3d at 1078, 979 N.E.2d at 1154, 955 N.Y.S.2d at 828.

126. 20 N.Y.3d 128, 982 N.E.2d 570, 958 N.Y.S.2d 650 (2012).

rebut her defense at trial that she stabbed her ex-boyfriend in self-defense.[127] The Court held this evidence to be improperly admitted, because the event was remote in time and there was no context to suggest a connection between the two events, nor was there any fairly drawn conclusion that the evidence tended to disprove self-defense in the case at bar.[128] There was a strong dissent by Judge Smith, who felt that such evidence was properly considered by the jury.[129]

VII. EXCEPTIONS TO THE HEARSAY RULE

A. Admissions and Confessions

When is confession obtained through aggressive police interrogation not admissible? The issue of voluntariness of confessions is a hot topic and historically a vigorously litigated issue in criminal trial proceedings. The Court of Appeals added its own voice to the issue in *People v. Guilford*,[130] where, in a unanimous decision, it sent a strong message regarding the legality of lengthy and coercive interrogations. "Courts have long condemned interrogations designed, as this one was, to break a suspect's will to resist self-incrimination by prolonged and virtually continuous questioning coupled with deprivation of basic human needs, most notably sleep."[131]

The defendant in *Guilford* appealed from a judgment convicting him of murder in the second degree of his former girlfriend. At a pre-trial suppression hearing, the trial court granted the defendant's suppression motion to the extent that it precluded statements made during an initial custodial interrogation lasting forty-nine-and-a-half hours. The court denied his motion and allowed the use of a confession that was made ten hours later, when the defendant returned for further interrogation, in the presence of assigned counsel, at which time he admitted, among other things, "I killed her."[132] By a divided court, the Appellate Division, Fourth Department affirmed the conviction.[133]

With the above-noted philosophical framework in mind, the Court of Appeals analyzed whether, as the prosecution contended, the break in time between the initial interrogation and the subsequent one, less than ten hours later, was sufficient to remove the taint of coercion that

127. *Id*. at 131, 982 N.E.2d at 571, 958 N.Y.S.2d at 651.
128. *Id.* at 135, 982 N.E.2d at 574, 958 N.Y.S.2d at 654.
129. *Id.* at 136-38, 982 N.E.2d at 575-76, 958 N.Y.S.2d at 655-56.
130. 21 N.Y.3d 205, 207, 991 N.E.2d 204, 205, 969 N.Y.S.2d 430, 431 (2013).
131. *Id.* at 212, 991 N.E.2d at 208, 969 N.Y.S.2d at 434.
132. *Id*. at 207-08, 991 N.E.2d at 205, 969 N.Y.S.2d at 431.
133. *Id*.

attached to the initial interrogation (there was no issue raised on appeal disputing that admissions obtained during the initial interrogation were coerced and properly not admissible).[134]

Prior caselaw addressing the issue of when a break in interrogations can remove the taint of an unlawfully obtained admission arose primarily in the context of cases involving late-issued *Miranda* warnings. In those cases, late-issued *Miranda* warnings were ineffective to remove the taint of illegality, unless there was a demonstration of a "pronounced break" in interrogation sufficient to establish the defendant was no longer "under the sway of the prior questioning when the warnings were given."[135]

This concept, referred to by the Court as the *Chapple-Bethea* Doctrine, requires that the reviewing court examine the entire course of interrogation to determine whether it was essentially a single transaction or separate segments, each susceptible to *Miranda* warnings.[136] The Court noted that this type of analysis has inherent inadequacies, as it did not adequately address coercive police interrogations and "the very stubborn problem posed by actual coercion, which involves the physical, cognitive and emotional depletion of the interrogation subject."[137] Under the new standard of review propounded by the Court in *Guilford*, the more lengthy the period of interrogation, and the comparatively shorter break time from the subsequent interrogations, the less likely the taint of coercion will be removed from any of the subsequently obtained admissions.[138]

In fairly harsh language, the Court condemned the initial interrogation in *Guilford,* which began at 11:30 p.m. on the night in question, when the defendant was read his *Miranda* rights and placed in a small windowless interrogation room. For forty-nine-and-a-half hours, he was aggressively interrogated, under constant observation, deprived of sleep, provided only a sandwich to eat, and given limited opportunity to leave the room, for bathroom purposes only. He was observed to be completely broken, staring at the floor, and weeping at times.[139]

At the end of his second full day of interrogation, the defendant

134. *Id*. at 207-08, 991 N.E.2d at 205, 969 N.Y.S.2d at 431.

135. *Guilford*, 21 N.Y.3d at 209, 991 N.E.2d at 206, 969 N.Y.S.2d at 432.

136. *Id.* at 209, 991 N.E.2d at 206, 969 N.Y.S.2d at 432. *See generally* People v. Bethea, 67 N.Y.2d 364, 493 N.E.2d 937, 502 N.Y.S.2d 713 (1986); People v. Chapple, 38 N.Y.2d 112, 341 N.E.2d 243, 378 N.Y.S.2d 682 (1975).

137. *Guilford*, 21 N.Y.3d at 209, 991 N.E.2d at 206, 969 N.Y.S.2d at 432.

138. *Id*.

139. *Id*. at 209-10, 991 N.E.2d at 207, 969 N.Y.S.2d at 433.

said he would tell the investigators and assistant district attorney everything that they wanted, including the location of the victim's body, if they would provide him with his own attorney.[140] After meeting and conferring with his new counsel, the defendant was arrested and spent the night at the local jail. The next morning, after arraignment, he was returned to the interrogation room with his attorney and questioned by the assistant district attorney and a supervising sergeant. At this point, he told the officer and the district attorney, "I killed her," and then made statements indicating he had dumped the body in a dumpster, without providing a specific location.[141] A jury convicted the defendant on proof including these admissions.[142]

The Court found the conditions of the interrogation in this case to be extremely long, with "extraordinary privation" including a lack of sleep and deprivation of food for over thirty hours.[143] Under such circumstances, the Court rejected the prosecution's argument that the eight-to-ten-hour break between the cessation of interrogation and arraignment was sufficient to remove the taint of the initial unlawful interrogation, with the Court finding that an overnight stay in a "holding pen," together with arraignment on the charge of murder, was insufficient to remove the taint of the prior interrogation from the admissions made during the subsequent interrogation.[144]

The Court also found that the presence of defendant's counsel did not remove the taint or otherwise validate the admissions made during the second interrogation, noting that, by the time the defendant met with his assigned counsel, "the die was largely cast" and, in any event, his counsel was largely unfamiliar with the facts and the circumstances and, in the Court's eyes, "[u]ltimately he became an unintended spectator to his client's confession and was called as a prosecution witness at trial."[145] Under these facts, the Court concluded that the admissions obtained during the second interrogation should not have been admitted at trial, reversed the conviction, and ordered a new trial.[146]

B. Business Records

A well-recognized and routine exception to the hearsay rule is the

140. *Id.* at 210, 991 N.E.2d at 207, 969 N.Y.S.2d at 433.
141. *Id.* at 211, 991 N.E.2d at 208, 969 N.Y.S.2d at 434.
142. *Guilford*, 21 N.Y.3d at 212, 991 N.E.2d at 208, 969 N.Y.S.2d at 434.
143. *Id*. at 212, 991 N.E.2d at 208-09, 969 N.Y.S.2d at 434-35.
144. *Id*. at 213, 991 N.E.2d at 209, 969 N.Y.S.2d at 435.
145. *Id.* at 213-14, 991 N.E.2d at 209-210, 969 N.Y.S.2d at 435-36.
146. *Id*. at 214-15, 991 N.E.2d at 210, 969 N.Y.S.2d at 436. .

business record exception, which allows the admission of records prepared in the ordinary course of business or governmental function, without the need of testimony from the witness who created and maintained the documents. Records pertaining to the routine inspection, maintenance and calibration of breathalyzer machines were held to be self-authenticating business records in *People v. Pealer.*[147]

The Court in *Pealer* held that such documents were "non-testimonial" and therefore not subject to the Confrontation Clause requirement set forth in *Crawford v. Washington*.[148] The defendant had argued, unsuccessfully, that the admission of these records through the testimony of the officer that administered the breathalyzer test, without testimony from the authors of the various records, raised a Confrontation Clause challenge. The defendant was convicted of DWI, which was unanimously affirmed by both the appellate division and the Court of Appeals.[149]

C. Excited Utterance/Present Sense Impression

Decided as a secondary issue in an assault conviction that was reversed and sent back for re-trial, the Court in *People v. Cantave*[150] held that the defendant's attempt to introduce evidence of his 911 call as an excited utterance or present sense impression was properly excluded at trial. The Court listened to the tape and determined that the 911 call made by the perpetrator, in which he claimed the victim attacked him first and injured him, lacked the indicia of reliability necessary to fit within the excited utterance or the present sense impression exceptions to the hearsay rule.[151] The Court found that, although the defendant sounded "somewhat agitated" on the call, his voice did not otherwise suggest that he did not have the opportunity to think before he called and perhaps provided a self-serving version of the events to the 911 operator.[152] He claimed he was injured in the altercation, but did not describe his injuries or request medical attention. At trial, the defendant's medical records did not show that he was injured. Under these facts, there was insufficient foundation for admission of the 911 call as an exited utterance.[153]

147. 20 N.Y.3d 447, 456, 985 N.E.2d 903, 908, 962 N.Y.S.2d 592, 598 (2013).

148. *Id*. at 451, 985 N.E.2d at 904, 962 N.Y.S.2d at 594 (citing Crawford v. Washington, 541 U.S. 36 (2004)).

149. *Id.* at 452, 985 N.E.2d at 905, 962 N.Y.S.2d at 594-95.

150. 21 N.Y.3d 374, 381, 993 N.E.2d 1257, 1263, 971 N.Y.S.2d 237, 242 (2013).

151. *Id*. at 381-82, 993 N.E.2d at 1263-64, 971 N.Y.S.2d at 242-43.

152. *Id*. at 382, 993 N.E.2d at 1263, 971 N.Y.S.2d at 242.

153. *Id*. at 382, 993 N.E.2d at 1263-64, 971 N.Y.S.2d at 242-43.

The Court also held that the defendant failed to satisfy the requisite evidentiary foundation for admission of the 911 call as a present sense impression exception to the hearsay rule. This exception requires proof that the statement was made by a party witnessing the event as it unfolded or immediately thereafter, and it must be corroborated or aided by independent evidence tending to establish the reliability of the statement. Here, the Court found that the defendant's statements on the 911 call were not made as events unfolded, but rather after he realized what he had done, and that it has been witnessed by the victim's wife. Furthermore, there was no evidence to corroborate the defendant's statement in the 911 call that the victim was the initial perpetrator.[154]

VIII. REAL EVIDENCE

Real evidence, sometime referred to as direct evidence, is tangible evidence which tends to directly prove a fact. Real evidence typically includes such things as photographs and audiotapes. The Court had occasion to address both during the past year. In *People v. Sanchez*,[155] the Court found that photographs taken on a "taxi cam" during an armed robbery were properly admitted at trial for identification purposes.[156]

In its memorandum decision in *Grucci v. Grucci*,[157] the Court addressed the foundational requirements for the admission of audiotapes and the statements contained on them. *Grucci* was a malicious prosecution lawsuit that arose in the context of a particularly contentious matrimonial proceeding. The defendant husband had sued his former wife, alleging she had maliciously brought criminal contempt charges against him, of which he was ultimately acquitted.[158]

During the course of the trial of the malicious prosecution case, the husband sought to introduce an audiotape of a telephone conversation that his former wife had made to his brother, in which she indicated, after she had already gone to the police, that she was not really afraid of her former husband.[159] The plaintiff husband argued that such evidence supported his theory that the criminal prosecution was instituted with malicious intent by his former wife and without probable cause. The evidence was excluded by the trial court, and the jury concluded that the defendant wife did not initiate the prosecution. The decision was

154. *Id*. at 382, 993 N.E.2d at 1264, 971 N.Y.S.2d at 243.
155. 21 N.Y.3d 216, 991 N.E.2d 698, 969 N.Y.S.2d 840 (2013).
156. *Id.* at 225, 991 N.E.2d at 703, 969 N.Y.S.2d at 845.
157. 20 N.Y.3d 893, 897, 981 N.E.2d 248, 251, 957 N.Y.S.2d 652, 655 (2012).
158. *Id*. at 895, 981 N.E.2d at 249-50, 957 N.Y.S.2d at 653-54.
159. *Id*. at 895, 981 N.E.2d at 250, 957 N.Y.S.2d at 654.

affirmed by the Appellate Division, Second Department.[160]

On appeal to the Court, the plaintiff husband argued that the trial court erred in refusing to allow his brother to authenticate the audiotape as a participant in the conversation and also in excluding from evidence the statements made by the defendant ex-wife during that telephone conversation, offered to show her state of mind.[161]

In reaching its decision, the Court first reiterated the evidentiary foundation for the admissibility of a taped conversation, specifically that the party seeking to introduce them must establish both identity and authenticity.[162] At trial, the plaintiff sought to authenticate the tape by having his brother testify that, as a participant in the two-person conversation, the tape was a true and accurate recording of the conversation he recalled transpiring. The plaintiff's attorney was not permitted to ask this question, the objection was sustained, and that was the end of the issue at trial.[163]

The Court agreed with the trial court, finding this proffered foundation insufficient to establish both identity and authenticity.[164] A comparison of the majority decision with the dissent by Judge Pigott highlights what may be a fundamental change in the foundational requirements for the admissibility of tape recordings. The majority articulated the requirement that the proponent of tape recordings must establish by clear and convincing proof that the tapes are genuine and have not been altered.[165] This has long been the rule in New York. However, in this case, the Court required more than the testimony of one of the parties to the conversation that the recording was complete and had not been altered.

In the majority's memorandum decision, the Court noted that, at trial, the plaintiff husband did not attempt to establish the identity of the person who recorded the conversation, the equipment used in recording it, or the chain of custody during the eight years that elapsed between the recording and the trial in late 2008. Upon these facts, the Court found that the trial court did not abuse its discretion by requiring more than the plaintiff's brother's testimony that the tape was fair and accurate as sufficient to establish sufficient foundation before playing

160. *Id.* at 895-96, 981 N.E.2d at 250, 957 N.Y.S.2d at 654.

161. *Id*. at 897, 981 N.E.2d at 251, 957 N.Y.S.2d at 655.

162. *Grucci*, 20 N.Y.3d at 897, 981 N.E.2d at 251, 957 N.Y.S.2d at 655 (citing People v. Ely, 68 N.Y.2d 520, 528, 503 N.E.2d 88, 93, 510 N.Y.S.2d 532, 537 (1986)).

163. *Id*.

164. *Id*. at 896, 981 N.E.2d at 250, 957 N.Y.S.2d at 654.

165. *Id*. at 897, 981 N.E.2d at 251, 957 N.Y.S.2d at 655 (citing *Ely*, 68 N.Y.2d at 522, 503 N.E.2d at 89, 510 N.Y.S.2d at 533).

the tape for the jury.[166]

The Court also upheld the trial court's rulings that prevented the plaintiff's brother from testifying about certain admissions attributed to the defendant wife during the conversation preserved on the audiotape. Plaintiff contended the admissions were offered to prove her state of mind, i.e., malice, rather than for the truth of their contents.[167] The Court noted that the statements would have to be true, that she lied to authorities, in order to establish malice. The Court also noted that while such statements were properly admissible as admissions of a party opponent, plaintiff's counsel never made this argument to the trial court.[168]

Furthermore, the Court held that, regardless of whether such statements were properly admissible as party admissions, the exclusion of the statements was not so material on the issue of whether the defendant spouse initiated the criminal prosecution as to require a new trial.[169] The Court found that the proof at trial was that the decision to prosecute was made by the assistant district attorney and not the defendant spouse, which supported the jury's verdict that the defendant did not initiate the contempt and harassment proceedings.[170]

In his dissent, Judge Pigott took issue with the evidentiary holdings of the majority, finding that the Court should have allowed the audiotape to be authenticated through the testimony of the plaintiff's brother, which, as proffered, would have been that he was a party to the conversation and that the tape completely and accurately reproduced the conversation.[171] Under such proof, corroborative authentication evidence and chain of custody was unnecessary because the witness to the conversation testified that what was on the tape was accurate.[172] In his opinion, the majority decision was in conflict with the Court's prior decision in *People v. Ely,* which was cited by the majority as a basis for its holding.[173]

A reading of *Ely* reveals that it contains support for the analysis of both the majority and dissent. The Court in *Ely* recognized three methods of establishing a proper foundation for the admission of

166. *Id*.
167. *Grucci*, 20 N.Y.3d at 897, 981 N.E.2d at 251, 957 N.Y.S.2d at 655.
168. *Id.* at 897-98, 981 N.E.2d at 251, 957 N.Y.S.2d at 655.
169. *Id*. at 898, 981 N.E.2d at 251, 957 N.Y.S.2d at 655.
170. *Id*. at 898, 981 N.E.2d at 252, 957 N.Y.S.2d at 656.
171. *Id*. at 900, 981 N.E.2d at 253, 957 N.Y.S.2d at 657.
172. *Grucci*, 20 N.Y.3d at 900, 981 N.E.2d at 253, 957 N.Y.S.2d at 657.
173. *Id.*

audiotape.[174] These include: (1) having a participant to the conversation testify the tape is a complete and accurate reproduction of the conversation and was not altered; (2) a machine operator's testimony that the tape conversation is an accurate recording, and the tape was not altered; or (3) testimony by the participant to the conversation along with an expert's testimony that the tape has not been altered.[175] The Court also noted a fourth method of establishing a foundation, which was to submit proof of chain of custody of the tape, along with testimonial evidence by a participant to the conversation. The Court explicitly stated this fourth method was not a foundational requirement for tape recordings, while suggesting that this chain of custody foundation would be appropriate where alteration and/or chain of custody were in dispute. This was the precise issue in *Ely*, and the basis for the Court's reversal, because of the improper admission of audiotape without proper foundation.[176]

In this context, it is easy to see how the *Ely* decision could be cited by the majority in *Grucci* as a basis for approving exclusion of the tape, in that the tape was eight years old by the time of trial and there was no corroborating evidence offered that it had not been altered. The Court apparently felt that the plaintiff's brother's proffered testimony, that the tape was accurate and complete, was a somewhat shaky evidentiary foundation due to the passage of time. To Judge Pigott's point, the majority decision may be interpreted by courts applying it as requiring, in all cases, external corroborating evidence as to the authority of the tape and a lack of alteration—which would eviscerate the first of the three foundational approaches described by the Court's decision in *Ely*.[177]

Judge Pigott also took issue with the majority's determination that the trial court's errors were harmless, as he believed the excluded evidence was directly relevant to the question of whether the defendant had falsely initiated the prosecution.[178] He noted that, by excluding the tape recording and the testimony regarding the defendant's admissions, the trial court prevented the plaintiff from establishing his case and

174. People v. Ely, 68 N.Y.2d 520, 528, 503 N.E.2d 88, 92, 510 N.Y.S.2d 532, 536 (1986).

175. *Id.* at 527, 503 N.E.2d at 92, 510 N.Y.S.2d at 536 (tapes ruled inadmissible for lack of proper foundation due to unresolved issues regarding the identity of voices on the tape, and whether tapes were complete and unaltered).

176. *Id.* at 527-28, 503 N.E.2d at 92-93, 510 N.Y.S.2d at 536-37.

177. *Grucci*, 20 N.Y.3d at 900-01, 981 N.E.2d at 253, 957 N.Y.S.2d at 657.

178. *Id.* at 901, 981 N.E.2d at 254, 957 N.Y.S.2d at 658.

therefore error was not harmless.[179] The plaintiff was attempting to introduce the evidence to show that the defendant was responsible for his prosecution by lying to the police that she was in fear for her life, when in fact she was not. That the plaintiff presented proof at trial that the decision to prosecute rests with the district attorney should not have been determinative of this issue. He theorized that the majority ruling could result in a situation that one who lies to the police to cause a criminal prosecution would be immunized from a malicious prosecution suit because the prosecutor is deemed the ultimate arbiter of whether a case is pursued.[180]

IX. WITNESSES

In last year's *Survey*, reference was made to the case *Caldwell v. Cablevision Systems Corp.*,[181] which addressed the propriety of a ten-thousand-dollar fee paid to subpoenaed fact witnesses and whether a specific bias charge to the jury was required. The decision of the Appellate Division, Second Department was affirmed by the Court of Appeals in a decision by Judge Pigott, holding that a party may offer evidence at trial that a subpoenaed fact witness was paid a fee greatly in excess of the amounts allowable by statute, specifically, CPLR 8001(a), and in such cases, a specific bias charge to the jury should be given by the trial court.[182]

The Court of Appeals was clearly troubled by the amount the emergency room doctor in that case was paid to testify regarding a single entry in the plaintiff's hospital chart.[183] That testimony described a different version of the trip and fall incident than that to which the plaintiff testified at trial, but did not involve any expert opinion or other analysis.[184] The witness was paid $10,000 for his very minimal time and testimony in the case. The Court held that the "[s]upreme [c]ourt should have instructed the jury that fact witnesses may be compensated for their lost time but that the jury should assess whether the compensation was disproportionately more than what was reasonable for the loss of the witness's time from work or business. Should the

179. *Id.* at 903, 981 N.E.2d at 255, 957 N.Y.S.2d at 659.

180. *Id*.

181. Patricia A. Lynn-Ford, *Evidence*, *2011-12 Survey of New York Law*, 63 SYRACUSE L. REV. 745, 754-56 (2013); 86 A.D.3d 46, 48, 925 N.Y.S.2d 103, 104-05 (2d Dep't 2011).

182. Caldwell v. Cablevision Sys. Corp., 20 N.Y.3d 365, 368, 984 N.E.2d 909, 910, 960 N.Y.S.2d 711, 712 (2013).

183. *Id.* at 370, 984 N.E.2d at 912, 960 N.Y.S.2d at 714.

184. *Id*. at 369, 984 N.E.2d at 911, 960 N.Y.S.2d at 713.

jury find that the compensation is disproportionate, it should then consider whether it had the effect of influencing the witness's testimony."[185]

The Court left it to the trial court's discretion to determine in a particular case whether the charge was warranted in light of the size of the payment to the witness, as well as the lost time and expenses for which the witness was being compensated.[186] In this case, the Court of Appeals agreed with the appellate division that the issue was harmless because the doctor's testimony was merely foundational in nature, i.e., to support the admissibility of the statement in the emergency room record and was therefore "only tangentially related to the doctor's credibility."[187]

In *People v. Thomas*,[188] the Court restated the rule that a request for a missing witness charge is not a prerequisite to making a missing witness argument in summation before the jury.[189] However, the Court found that the refusal to allow the defendant's attorney to make such an argument was harmless error in light of overwhelming physical evidence of the complainant's injuries in a domestic violence related prosecution.[190]

CONCLUSION

This concludes a review of the notable New York Court of Appeals cases from the past year addressing evidentiary issues. Perhaps the most politically powerful decision is *People v. Guilford*, where the Court condemned coercive police interrogations with strong language, and discouraged the use of admissions obtained in subsequent or continued interrogations. It will be interesting to see how this issue will evolve as more and more interrogations are videotaped and as the law continues to expand in its acknowledgement of the prevalence of false confessions.

185. *Id*. at 372, 984 N.E.2d at 913, 960 N.Y.S.2d at 715.
186. *Id.*
187. *Caldwell*, 20 N.Y.3d at 372, 984 N.E.2d at 913, 960 N.Y.S.2d at 715.
188. 21 N.Y.3d 226, 991 N.E.2d 200, 969 N.Y.S.2d 426 (2013).
189. *Id.* at 230, 991 N.E.2d at 203, 969 N.Y.S.2d at 429.
190. *Id*. at 231, 991 N.E.2d at 203-04, 969 N.Y.S.2d at 429-30.