EVIDENCE

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INTRODUCTION

This annual *Survey* will proceed through the traditional evidence categories for a review of those cases decided and legislation enacted during the *Survey* year that are of particular interest. It covers decisions by the New York Court of Appeals, the four Appellate Division departments, a decision of a Supreme Court judge, and two new statutes addressing specific evidence matters.

Perhaps the most significant development on the evidence landscape is not a judicial decision or statute but the publication on the New York State Uniform Court System website of the "*Guide to New York Evidence*" ("*Guide*").[1]

The *Guide* consists of a compilation of New York's existing rules of evidence, both common law and statutory, written in Code Style–a rule in statutory format, followed by a Note which sets forth the source, meaning, and nuances of the Rule. To the extent practicable, the language of each Rule adheres to controlling decisional law, especially from the Court of Appeals, and current statutory language. While the *Guide*'s articles parallel the organization of the Federal Rules of Evidence in large part, it does not utilize the language of a Federal Evidence Rule except when that language has been adopted in New York decisional law.[2]

The Committee's goal in the creation of the *Guide* is the creation of a "single, definitive compilation of New York's law of evidence. Creating an accessible, easy-to-use guide for judges and lawyers will save research time, promote uniformity in applying the law, avoid erroneous rulings

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1. N.Y. UNIFIED CT. SYS. GUIDE TO N.Y. EVIDENCE COMM., https://www.nycourts.gov/JUDGES/evidence (last visited Apr. 6, 2020).

2. William C. Donnino, *New York's Evidence Guide: The Court System's 'Best Kept Secret,'* N.Y.L.J. (Sept. 10, 2019), https://www.law.com/newyorklawjournal/2019/09/10/new-yorks-evidence-guide-the-court-systems-best-kept-secret/. The layout and format of the *Guide* are more fully discussed in this article.

and improve the quality of legal proceedings."[3] In this connection, it is notable that the *Guide* was cited during the *Survey* year in four Appellate Division opinions, in support of their respective holdings.[4]

The *Guide* is the product of an Advisory Committee established by Chief Judge Janet DiFiore.[5] The Committee, co-chaired by former Court of Appeals judge Susan Read and former Nassau County Supreme Court judge William C. Donnini, is comprised of 15 current or former state court judges and a Reporter, all of whom were appointed by Chief Judge DiFiore.[6] The Committee will regularly update the Guide, adding additional rules and revisions of existing rules made necessary by judicial decisions and legislative enactments.

I. PROCEDURAL CONCERNS

A. Judicial Control of the Trial Court

The Court of Appeals has stated on several occasions that "neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process."[7] Indeed, the Court has emphasized that the trial court may often assume a vital role by its clarification of confusing testimony and facilitation of the orderly and expeditious progress of the trial.[8]

3. Chief Judge Janet DiFiore, *The State of Our Judiciary 2017*, 12 (Feb. 22, 2017), http://www.nycourts.gov/CTAPPS /news/SOJ-2017.pdf.

4. *See* Caminiti v. Extell W. 57th St. LLC, 166 A.D.3d 440, 440, 88 N.Y.S.3d 13, 15 (1st Dep't 2019) (citing Guide to N.Y. Evidence Rule 8.11 (Statement Against Penal or Pecuniary Interest)); *People v. Reed*, 169 A.D.3d 573, 573, 95 N.Y.S.3d 81, 83 (1st Dep't 2019) (citing Guide to N.Y. Evidence Rule 8.41 (State of Mind)); *People v. Figueroa*, 171 A.D.3d 549, 550, 98 N.Y.S.3d 165, 166 (1st Dep't 2019) (citing Guide to N.Y. Evidence Rule 8.29 (Present Sense Impression)); *People v. Pascuzzi*, 173 A.D.3d 1367, 1375, 1377, 102 N.Y.S.3d 778, 787, 789 (3d Dep't 2019) (citing Guide to N.Y. Evidence Rules 7.01 (3) (Opinion of Expert Witness), 8.00(1) (Definition of Hearsay), and 8.13 (1)(a) (Declaration of Future Intent)). *See also* Billok v. Union Carbide Corp., 170 A.D. 1388, 1391, 96 N.Y.S.3d 714, 718 (3d Dep't 2019) (Lynch & Pritzker, J.J., dissenting) (citing Guide to N.Y. Evidence Rule 8.33 (Prior Inconsistent Statement)).

5. *See* Joel Stashenko, *Advisory Panel to Compile Guide to NY Evidence Law*, 256 N.Y.L.J. 1 (2016).

6. *Id*. The author serves as the Reporter.

7. *See* People v. Jamison, 47 N.Y.2d 882, 883, 393 N.E.2d 467, 468, 419 N.Y.S.2d 472, 473 (1979); *see generally* People v. Moulton, 43 N.Y.2d 944, 945, 374 N.E.2d 1243, 1244, 403 N.Y.S.2d 892, 893 (1978); People v. DeJesus, 42 N.Y.2d 519, 523, 369 N.E.2d 752, 755, 399 N.Y.S.2d 196, 198–99 (1977); *see also* People v. Yut Wai Tom, 53 N.Y.2d 44, 57, 422 N.E.2d 556, 564, 439 N.Y.S.2d 896, 903 (1981).

8. *See* People v. Gonzales, 38 N.Y.2d 208, 210, 341 N.E.2d 822, 823, 379 N.Y.S. 397, 398 (1975); People v. Hinton, 31 N.Y.2d 71, 76, 286 N.E.2d 265, 267, 334 N.Y.S.2d 885, 889 (1972) (citing People v. Mendez, 3 N.Y.2d 120, 121, 143 N.E.2d 806, 807, 164 N.Y.S.2d 401, 402 (1957)).

However, the Court cautioned the trial court that intervening in a trial may not take on "the function or appearance of an advocate."[9] When that situation occurs, there arise significant risks of prejudicial unfairness which may render the trial unfair.[10]

Whether the line was crossed is the subject of two Appellate Division Second Department decisions.[11] They are instructive to the bench and bar as to when judicial interference in the trial process will be deemed to have crossed the line between furthering the truth-seeking trial process and denying a party a fair trial.

In *People v. Ramsey*, the Appellate Division, Second Department, reversed a robbery conviction and remanded for a new trial before a different judge on the ground the trial judge conducted excessive and prejudicial questioning of trial witnesses.[12] It determined the trial judge engaged in extensive questioning of the People's witnesses during their direct examination, educating and assisting in the development of facts damaging to the defense.[13] The court further found the questioning bolstered the witnesses' credibility.[14] Additionally, the court noted that the trial judge interrupted the cross-examination of the People's witnesses.[15] With these findings, the court concluded the trial judge "created the impression that it was an advocate on behalf of the People," thereby depriving the defendant of a fair trial.[16]

The Second Department likewise concluded that the defendant in *People v. Sookdeo* was denied a fair trial by the trial court's improper interference with the trial process.[17] The court determined the trial judge had crossed the line and became, in effect, an advocate for the People by questioning of witnesses which elicited step-by-step details about how the defendant was identified by the witnesses as a suspect.[18] The court concluded by noting that a trial judge's "function is to protect the record,

9. People v. Arnold, 98 N.Y.2d 63, 67, 745 N.E.2d 782, 786, 745 N.Y.S.2d 1140, 1144 (2002) (citing *DeJesus*, 42 N.Y.2d at 524, 369 N.E.2d at 755–56, 399 N.Y.S.2d at 199).

10. *See Yut Wai Tom*, 53 N.Y.2d at 57–58, 422 N.E.2d at 563–64, 439 N.Y.S.2d at 903–04.

11. People v. Ramsey, 174 A.D.3d 651, 652, 101 N.Y.S.3d 907, 907 (2d Dep't 2019); People v. Sookdeo, 164 A.D.3d 1268, 1269, 82 N.Y.S.3d 114, 115 (2d Dep't 2018).

12. 174 A.D.3d at 651–52, 101 N.Y.S.3d at 907.

13. *Id.* at 652, 101 N.Y.S.3d at 908.

14. *Id.*

15. *Id.*

16. *Id.*

17. 164 A.D.3d 1268, 1269, 82 N.Y.S.3d 114, 115 (2d Dep't 2018).

18. *Id.* at 1270, 82 N.Y.S.3d at 115.

not to make it."[19] Needless to say, the judges in both *Ramsey* and *Sookdeo* made the record and thus crossed the line.[20]

B. Continuance

Invariably, during the course of a trial a need for continuance will arise to allow for the testimony of a witness. Civil Practice Law and Rules (CPLR) 4402 authorizes a trial judge to grant a continuance "in the interest of justice on such terms as may be just."[21] The decision whether to grant a continuance is a matter within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of that discretion.[22] The courts have adopted a rule that informs the exercise of that discretion.[23] This rule provides that "[i]t is an abuse of discretion to deny a continuance where the application complies with every requirement of the law and is not made merely for delay, where the evidence is material and where the need for a continuance does not result from the failure to exercise due diligence."[24] In other words, "[l]iberality should be exercised in granting postponements or continuance of trials to obtain material evidence and to prevent miscarriages."[25]

The Appellate Division, First Department, addressed the issue of granting or denying a continuance to permit a witness to testify at trial in *Freeman v. Shtogaj*.[26] In this motor vehicle accident case, defendants requested a continuance of the trial to permit their expert orthopedist to testify about his examination of one plaintiff and to permit their expert radiologist to testify about her interpretation of another plaintiff's MRI films.[27] The trial judge denied the request.[28] The court held the trial judge

19. *Id.* at 1269, 82 N.Y.S.3d at 115 (quoting People v Yut Wai Tom, 53 N.Y.2d 44, 58, 422 N.E.2d 556, 564, 439 N.Y.S.2d 896, 904 (1981)).

20. *See Ramsey*, 174 A.D.3d at 652, 101 N.Y.S.3d at 907; *see also id.*

21. N.Y. C.P.L.R. 4402 (McKinney 2019).

22. *See* Guzman v. 4030 Bronx Blvd. Assocs. L.L.C., 54 A.D.3d 42, 52, 861 N.Y.S.2d 298, 305 (1st Dep't 2008) (first citing Matter of Sakow, 21 A.D.3d 849, 849, 802 N.Y.S.2d 396, 397 (1st Dep't 2005); then citing Sakow v. Breslaw 7 N.Y.3d 706, 706, 868 N.E.3d 662, 662, 837 N.Y.S.2d 1, 1 (2006) (internal citations omitted); then citing Telford v. Laro Maint. Corp., 288 A.D.2d 302, 303, 732 N.Y.S.2d 882, 883 (2d Dep't 2001) (internal citations omitted); and then citing Balogh v. H.R.B. Caterers, Inc., 88 A.D.2d 136, 143, 452 N.Y.S.2d 220, 226 (2nd Dep't 1982) (internal citations omitted)).

23. *Balogh*, 88 A.D.2d at 141, 452 N.Y.2d at 224.

24. *Id.*

25. *Id.* at 141, 452 N.Y.2d at 224–25 (citing Canal Oil Co. v. Nat'l Oil Co., 66 P.2d 197, 202 (Cal. Dist. Ct. App. 1937).

26. 174 A.D.3d 448, 449, 106 N.Y.S.3d 295, 297 (1st Dep't 2019) (citing *Guzman*, 54 A.D.3d at 43, 861 N.Y.S.2d at 299).

27. *Id.*

28. *Id.*

abused his discretion in denying the continuance request for the orthopedist.[29] It noted the orthopedist's testimony was likely to be material because his specialty was directly related to that of plaintiff's expert, his opinion was based on his physical examination of plaintiff and not a review of her MRI films, and his testimony was directly relevant to damages.[30] The need for the continuance arose because of the orthopedist's unavailability, which was the result of an unexpected death in his family,[31] and the resulting delay would have been brief.[32] The court then added that the need for a continuance arose because of the trial's "constricted timeline due to the court's vacation schedule."[33] However, as to the request for a continuance to accommodate the radiologist, the court held the denial of the request was not an abuse of discretion.[34] The basis for this holding was that the defendants' need for a continuance resulted from their failure to exercise due diligence.[35] Such failure was present because defendants admittedly knew before the trial began that the radiologist would not be available until after the judge left for vacation but failed to timely raise the issue of a continuance.[36]

The court's decision in *Freeman* is instructive. In this regard, it fully states the showing an attorney must make to secure a continuance and warns that advance planning as to the availability of witnesses and the notification of the court as to a witness unavailability must be made as soon as practicable.[37]

C. Revisiting Evidence Rulings

The Court of Appeals has long held that a trial judge's evidentiary rulings do not fall within the law of the case doctrine, which precludes a court from reconsidering, disturbing, or overruling an order or ruling in the same action of another court of coordinate jurisdiction.[38] Thus, a trial court has discretion to make its own determination as to the admissibility

29. *Id.*

30. *Id.*

31. *Freeman*, 174 A.D.3d at 449, 106 N.Y.S.3d at 297.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Freeman*, 174 A.D.3d at 449, 106 N.Y.S.3d at 297.

37. *See id.* (explaining that denying a continuance is appropriate where its need arises from a lack of due diligence on the part of the requesting party).

38. People v. Evans, 94 N.Y.2d 499, 504, 727 N.E.2d 1232, 1236, 706 N.Y.S.2d 678, 682 (2000) (first citing Dondi v. Jones, 40 N.Y.2d 8, 15, 351 N.E.2d 650, 656, 386 N.Y.S.2d 4, 9 (1976); and then citing Martin v. Cohoes, 37 N.Y.2d 162, 165, 332 N.E.2d 867, 869, 371 N.Y.S.2d 687, 689 (1975)).

of proffered evidence, even if the admissibility of that evidence had been previously determined.[39]

The Court of Appeals revisited this exception to the law of the case rule in *People v. Cummings*.[40] In this assault prosecution, the People at the defendant's first trial sought to admit a person's statement in a 911 call under the excited utterance exception to the hearsay rule, but their application was denied.[41] The jury deadlocked and the Court declared a mistrial. The retrial was assigned to a different judge, who during the jury selection process denied the People's application to admit the statement.[42] The judge then became ill and was replaced by another judge.[43] The People renewed their application to admit the statement, and the newly assigned judge ruled the statement was admissible as an excited utterance.[44] The defendant was convicted of assault but acquitted of attempted murder charges.[45]

The Court ruled the substitute judge was not bound by law of the case, and acted within his discretion to revisit the excited utterance ruling.[46] In its view, there was "no reason to apply a different rule to a successor judge within the same trial."[47] However, the Court cautioned that a showing of prejudice to the defendant that would occur if the prior ruling was not followed may preclude a different ruling by the successor judge.[48] Prejudice may, for example, the Court noted, result from a mid-trial reversal of an evidentiary ruling that impedes the defense strategy.[49]

39. People v. McLeod, 279 A.D.2d 372, 372, 719 N.Y.S.2d 557 (1st Dep't 2001) (citing *Evans*, 94 N.Y.2d at 506, 727 N.E.2d at 1237, 706 N.Y.S.2d at 683); *see* People v. Johnson, 301 A.D.2d 462, 463, 753 N.Y.S.2d 832, 833 (1st Dep't 2003) (citing *Evans*, 94 N.Y.2d at 506, 727 N.E.2d at 1237, 706 N.Y.S.2d at 683), *leave to appeal denied*, 99 N.Y.2d 655, 790 N.E.2d 294, 760 N.Y.S.2d 120.

40. *See generally* 31 N.Y.3d 204, 99 N.E.3d 877, 75 N.Y.S.3d 484 (2018) (addressing whether the Appellate Division properly affirmed a trial court's decision to admit a statement as an excited utterance).

41. *Id*. at 207, 99 N.E.3d at 880, 75 N.Y.S.3d at 487.

42. *Id*.

43. *Id.*

44. *Id*.

45. *Cummings*, 31 N.Y.3d at 207, 99 N.E.3d at 880, 75 N.Y.S.3d at 487.

46. *Id*. at 209, 99 N.E.3d at 881, 75 N.Y.S.3d at 488 (citing People v. Evans, 94 N.Y.2d 499, 506, 727 N.E.2d 1232, 1237, 706 N.Y.S.2d 678, 683 (2000)).

47. *Id*. at 208, 99 N.E.3d at 881, 75 N.Y.S.3d at 488.

48. *Id*. at 208, 99 N.E.3d at 880, 75 N.Y.S.3d at 487 (quoting United States v. Wade, 512 F. App'x 11, 14 n.1 (2d Cir. 2013)).

49. *Id*. at 209, 99 N.E.3d at 881, 75 N.Y.S.3d at 488; *see also* GUIDE TO N.Y. EVID. RULE 1.17, https://www.nycourts.gov/judges/evidence/1GENERAL/1.17_EFFECT%20OF%20ERRONEOUS%20RULING.pdf.

D. Objections and Preservation

As a general proposition, a party's failure to make a timely and proper objection to a ruling or order of the trial court precludes the party from obtaining appellate review of a claimed error in the ruling or order as a question of law.[50] This rule and its exceptions were the subject of several decisions.[51] While none of these decisions altered the rule in any meaningful fashion, a few are worthy of mention because they are instructive regarding the application of the rule and its exceptions.[52]

In *Kleiber v. Fichtel*, plaintiff sought to recover damages for injuries he allegedly sustained in a motor vehicle accident.[53] The defendants having conceded liability for the accident, the action proceeded to trial on the issues of whether plaintiff sustained a serious injury within the meaning of Insurance Law section 5102(d)[54] and damages.[55] At the trial the plaintiff presented the testimony of his treating orthopedic surgeon who testified that he performed cervical discectomy and spinal fusion surgery on the plaintiff's spine, and opined the accident was the cause of plaintiff's injuries.[56]

During his summation, defense counsel argued that the plaintiff has "been lying and exaggerating for a few years now."[57] Defense counsel also referred to the plaintiff's case as a "tissue box of lies" and a "landfill of lies."[58] Defense counsel twice referred to the plaintiff's case as a "charade."[59] Lastly, he argued to the jury that the plaintiff's orthopedic surgeon knowingly performed unnecessary surgery on the plaintiff because "that's where the money is."[60] The plaintiff's counsel did not

50. N.Y. C.P.L.R. 4017, 5501(a)(3) (McKinney 2019); *see also* GUIDE TO N.Y. EVID. RULE 1.15, https://www.nycourts.gov/judges/evidence/1GENERAL/1.15_PRESERVATION%20OF%20ERROR.pdf; MICHAEL M. MARTIN, DANIEL J. CAPRA & FAUST F. ROSSI, NEW YORK EVIDENCE HANDBOOK 13–14 (2d ed. 2003).

51. *See, e.g.*, Kleiber v. Fichtel, 172 A.D.3d 1048, 101 N.Y.S.3d 354 (2d Dep't 2019); People v. Lamb, 164 A.D.3d 1470, 83 N.Y.S.3d 219 (2d Dep't 2018); People v. Phipps, 168 A.D.3d 881, 91 N.Y.S.3d 466 (2d Dep't 2019).

52. *See Kleiber*, 172 A.D.3d at 1052, 101 N.Y.S.3d at 358; *Lamb*, 164 A.D.3d at 1472, 83 N.Y.S.3d at 221.

53. 172 A.D.3d at 1048, 101 N.Y.S.3d at 356.

54. N.Y. INS. LAW § 5102(d) (McKinney 2019).

55. *Kleiber*, 172 A.D.3d at 1048, 101 N.Y.S.3d at 356.

56. *Id*. at 1048–49, 101 N.Y.S.3d at 356.

57. *Id*. at 1049, 101 N.Y.S.3d at 356.

58. *Id.* The "tissue box of lies" remark was a reference to the plaintiff's testimony, both at trial and at a social security hearing, that he had difficulty lifting objects, such as a tissue box. *Id.*

59. *Kleiber*, 172 A.D.3d at 1049, 101 N.Y.S.3d at 356.

60. *Id.*

object to any of these remarks either at the time they were made or at the conclusion of the defense summation, nor did he move for a mistrial.[61]

The jury found that the plaintiff did not sustain a serious injury, thus precluding recovery for the plaintiff's claimed pain and suffering, and that the plaintiff sustained $50,000.00 in damages for lost earnings but those damages should be reduced by $25,000.00 because of his failure to wear a seat belt.[62] Thereafter, the plaintiff moved to set aside the verdict on the issue of damages in the interests of justice and for a new trial on damages on the ground the remarks made by defense counsel in his summation deprived plaintiff of a fair trial.[63] The trial court granted the motion.[64]

The Appellate Division, Second Department, reversed.[65] The basis for its reversal was that plaintiff's counsel's failure to object to the challenged remarks precluded review of his argument as a matter of law.[66] While the court recognized that it could hear the argument under its interests of justice review power,[67] it further held that "[w]here no objection is interposed, a new trial may be directed only where the remarks are so prejudicial as to have caused a gross injustice, and where the comments are so pervasive, prejudicial, or inflammatory as to deprive a party of a fair trial."[68] According to the court, this standard was not met in this case.[69]

Notably, the court commented that it is the duty of counsel when a purportedly improper comment is made "to make a specific objection and for the court to rule on the objection, to direct the jury to disregard any

61. *Id.*

62. *Id.*

63. *Id.* at 1049, 101 N.Y.S.3d at 356–57.

64. *Kleiber*, 172 A.D.3d at 1049–50, 101 N.Y.S.3d at 357.

65. *Id.* at 1052, 101 N.Y.S.3d at 358.

66. *Id.* at 1051–52, 101 N.Y.S.3d at 358 (first citing Wilson v. City of New York, 65 A.D.3d 906, 908, 885 N.Y.S.2d 279, 281 (1st Dep't 2009); then citing Lucian v. Schwartz, 55 A.D.3d 687, 689, 865 N.Y.S.2d 643, 645 (2d Dep't 2008); then citing Binder v. Miller, 39 A.D.3d 387, 387, 835 N.Y.S.2d 62, 63 (1st Dep't 2007); and then citing Lind v. City of New York, 270 A.D.2d 315, 317, 705 N.Y.S.2d 59, 61 (2d Dep't 2000)).

67. *Id.* at 1049, 101 N.Y.S.3d at 356–57 (citing N.Y. C.P.L.R. 4404(a) (McKinney 2019)).

68. *Id.* at 1052, 101 N.Y.S.3d at 358 (first citing Farias-Alvarez v. Interim Healthcare of Greater N.Y., 166 A.D.3d 945, 947, 88 N.Y.S.3d 485, 487 (2d Dep't 2018); and then citing *Wilson*, 65 A.D.3d at 908, 885 N.Y.S.2d at 281).

69. *Kleiber*, 172 A.D.3d at 1052, 101 N.Y.S.3d at 358; *see* People v. Freire, 168 A.D.3d 973, 976, 92 N.Y.S.3d 115, 119 (2d Dep't 2019) (applying similar standard in a criminal case) (first citing People v. Mason, 132 A.D.3d 777, 778, 17 N.Y.S.3d 768, 769–70 (2d Dep't 2015); then citing People v. Gomez, 153 A.D.3d 724, 725–26, 61 N.Y.S.3d 70, 72 (2d Dep't 2017); and then citing People v. Portes, 125 A.D.3d 794, 794, 4 N.Y.S.3d 97, 98 (2d Dep't 2015)).

improper remarks, and to admonish counsel for repetition of improper remarks."[70] This action must be taken to preserve the issue as a matter of law notwithstanding common courtesy requires that an attorney allow opposing counsel an opportunity to argue his or her case to the jury without undue or repetitive obstructions."[71] The court added that where an objection is not, or cannot appropriately be made during summation, the issue can still be preserved if counsel, upon the conclusion of the summation, makes an appropriate objection, seeks a curative instruction, or requests a mistrial.[72]

Two other preservation-related decisions are worth noting, *People v. Lamb*[73] and *People v. Phipps*.[74] Both involved an effort to invoke the mode of proceedings error rule.[75] A mode of proceedings error is reviewable as a question of law in the absence of an objection in all New York appellate courts.[76] This exception is, however, reserved for "the most fundamental flaws."[77]

The defendant in *People v. Lamb* argued that he was deprived of a fair trial by a remark made by the trial court to prospective jurors during *voir dire* relating to their English language proficiency.[78] However, the defendant failed to object or otherwise protest this misconduct.[79] The defendant in *People v. Phipps* similarly argued that he was denied a fair

70. *Kleiber*, 172 A.D.3d at 1051, 101 N.Y.S.3d at 358 (citing *Binder*, 39 A.D.3d at 387, 835 N.Y.S.2d at 63).

71. *Id.*

72. *Id.* at 1051–52, 101 N.Y.S.3d at 358 (first citing *Wilson*, 65 A.D.3d at 908, 885 N.Y.S.2d at 281; then citing Lucian v. Schwartz, 55 A.D.3d 687, 689, 865 N.Y.S.2d 643, 645 (2d Dep't 2008); then citing *Binder*, 39 A.D.3d at 387, 835 N.Y.S.2d at 63; and then citing Lind v. City of New York, 270 A.D.2d 315, 317, 705 N.Y.S.2d 59, 61 (2d Dep't 2000)).

73. *See* 164 A.D.3d 1470, 83 N.Y.S.3d 219 (2d Dep't 2018).

74. *See* 168 A.D.3d 881, 91 N.Y.S.3d 466 (2d Dep't 2019).

75. *See generally Lamb*, 164 A.D.3d 1470, 83 N.Y.S.3d 219 (ruling that court's remarks to prospective jurors during *voir dire* did not constitute a mode of proceedings error that would exempt defendant from the rule of preservation). *See generally Phipps*, 168 A.D.3d 881, 91 N.Y.S.3d 466 (ruling that court misconduct during *voir dire* did not constitute a mode of proceedings error that would exempt defendant from the rule of preservation).

76. *See also* People v. Meyers, 33 N.Y.3d 1018, 1021–22, 125 N.E.3d 822, 824, 102 N.Y.S.3d 157, 159 (2019) (Garcia, J., concurring) ("[m]ode of proceedings errors carry extreme and mandatory consequences—immunity from the rules governing preservation, waiver and harmless error . . .").

77. People v. Beacoats, 17 N.Y.3d 643, 651, 958 N.E.2d 865, 868, 934 N.Y.S.2d 737, 739 (2011).

78. 164 A.D.3d at 1471, 83 N.Y.S.3d 219 at 221 (first citing People v. Cunningham, 119 A.D.3d 601, 601, 988 N.Y.S.2d 696, 697 (2d Dep't 2014); and then citing N.Y. C.P.L.R. 470.05 (McKinney 2019)).

79. *Id.*

trial by reason of the trial court's improper remarks to prospective jurors during *voir dire*, remarks he did not object to.[80]

The Appellate Division, Second Department, rejected the defendants' argument that these errors constituted mode of proceeding error.[81] Its rejection clearly indicated that the mode of proceedings rule will not be applied to mere claims of trial error, whether improper comments by the trial court or evidentiary rulings.[82] While the Appellate Division may still review the claimed error pursuant to its interest of justice review power,[83] such review is not available in the Court of Appeals as it does not possess interest of justice review authority.[84]

II. EVIDENTIARY SHORTCUTS

A. Presumptions

New York recognizes a common law presumption which provides that a rear-end collision with a stopped vehicle establishes a presumption of negligence on the part of the driver of the rear vehicle, which presumption can be rebutted by the driver of the rear vehicle through evidence of a non-negligent explanation for the collision.[85] Several appellate division decisions addressed the issue of what will constitute a non-negligent explanation in the context of a claim of a sudden stop by the driver of the rear-ended vehicle.[86] Of note, these decisions uniformly

80. 168 A.D.3d at 881, 91 N.Y.S.3d at 468 (first citing N.Y. C.P.L.R. 470.05; then citing People v. Porter, 153 A.D.3d 857, 857–58, 61 N.Y.S.3d 99, 100 (2d Dep't 2017); then citing People v. Gomez, 153 A.D.3d 724, 725, 61 N.Y.S.3d 70, 72 (2d Dep't 2017); and then citing People v. Dudley, 151 A.D.3d 878, 879, 54 N.Y.S.3d 297, 298 (2d Dep't 2017)).

81. *Lamb*, 164 A.D.3d at 1472, 85 N.Y.S.3d at 221 (first citing *Porter*, 153 A.D.3d at 858, 61 N.Y.S.3d at 100; and then citing People v. Mason, 132 A.D.3d 777, 779, 17 N.Y.S.2d 768, 770 (2d Dep't 2015)).

82. *Id.*

83. N.Y. CRIM. PROC. LAW § 470.15(3)(c), (6)(a) (McKinney 2019).

84. *See* Hecker v. State, 20 N.Y.3d 1087, 1087, 987 N.E.2d 636, 636, 965 N.Y.S.2d 75, 75 (2013) (first citing Elezaj v. Carlin Constr. Co., 89 N.Y.2d 992, 994, 679 N.E.2d 638, 657 N.Y.S.2d 399 (1997); then citing Brown v. City of New York, 60 N.Y.2d 893, 894, 458 N.E.2d 1248, 1249, 470 N.Y.S.2d 571, 572 (1983); then citing Feinberg v. Saks & Co., 56 N.Y.2d 206, 210, 436 N.E.2d 1279, 1280, 451 N.Y.S.2d 677, 678 (1982); and then citing Domino v. Mercurio, 13 N.Y.2d 922, 923, 244 N.Y.S.2d 69, 70 (1963)); N.Y. UNIFIED CT. SYS., GUIDE TO NEW YORK EVIDENCE RULE 1.15 n. 3 (2017), https://www.nycourts.gov/judges/evidence/1-GENERAL/1.15_PRESERVATION%20OF%20ERROR.pdf.

85. *See* Tutrani v. County of Suffolk, 10 N.Y.2d 906, 908, 891 N.E.2d 726, 727, 861 N.Y.S.2d 610, 611 (2008) (citing Stalikas v. United Materials, L.L.C., 306 A.D. 810, 810, 760 N.Y.S.2d 804, 805 (4th Dep't 2003)); Michael J. Hutter, *Evidence, 2000-01 Survey of New York Law*, 52 SYRACUSE L. REV. 397, 401–02 (2002).

86. *See, e.g.*, Animah v. Agytel, 63 Misc. 3d 783, 786–87, 97 N.Y.S.3d 440, 443 (Sup. Ct. Bronx Cty. 2019) (first citing Tejeda v. Aifa, 134 A.D.3d 549, 550, 22 N.Y.S.3d 18, 19 (1st

recognize that a mere claim of a sudden stop is insufficient to rebut the presumption.[87] Instead, they hold a sudden stop *coupled* with some other fact that would have increased the likelihood of the collision can give rise to a question of fact as to whether the driver of the rear-ending vehicle has a non-negligent explanation for the collision.[88] These decisions then provide examples of what circumstances may and may not create such a question of fact.[89]

The Second Department in *Richter v. Delutri* provided an example of what can be found to be a non-negligent explanation.[90] The driver of the rear vehicle testified that the collision occurred when the plaintiff's vehicle came to an abrupt stop in front of him on an exit ramp when there was no vehicular traffic in front of it.[91] While a driver must ordinarily maintain a safe distance from other vehicles and drive at a safe rate of speed under the existing conditions, thereby allowing time to avoid a rear-end collision,[92] a non-negligent explanation was present here as the driver of the rear vehicle could certainly have reasonably expected that plaintiff would continue driving.[93] The Fourth Department in *Macri v. Kotrys* found a non-negligent explanation for a rear-end collision resulting from the lead vehicle's sudden stop based on evidence that the lead vehicle had abruptly stopped at a green light.[94] In this situation, a question of fact was present as the rear driver could have reasonably expected the lead vehicle to continue.[95]

On the other hand, the Second Department in *Catanzaro v. Edery* rejected an argument by the rear driver that he could not have avoided the

Dep't 2015); then citing Passos v. MTA Bus Co., 129 A.D.3d 481, 481, 13 N.Y.S.3d 4, 6 (1st Dep't 2015); then citing Hernandez v. Advance Transit Co., Inc., 101 A.D.3d 483, 484, 954 N.Y.S.2d 869, 869 (1st Dep't 2012); then citing Stringari v. Peerless Imps., Inc., 304 A.D.2d 413, 413, 757 N.Y.S.2d 554, 555 (1st Dep't 2003); and then citing Schuster v. Amboy Bus Co., 267 A.D.2d 448, 448–49, 700 N.Y.S.2d 484, 485 (2d Dep't 1999)).

87. *Id.*

88. A thoughtful decision by a Supreme Court judge has recognized this aspect of their decisions. *See id.* (Higgitt, J.).

89. *See, e.g., id.*

90. 166 A.D.3d 695, 696, 87 N.Y.S.3d 185, 186 (2d Dep't 2018).

91. *Id.*

92. *See* Miller v. DeSouza, 165 A.D.3d 550, 550, 89 N.Y.S.3d 79, 80 (1st Dep't 2018) (first citing N.Y. VEH. & TRAF. LAW § 1180[a] (McKinney 2019); then citing Chepel v. Meyers, 306 A.D.2d 235, 236, 762 N.Y.S.2d 95, 97 (3d Dep't 2003); then citing N.Y. VEH. & TRAF. LAW § 1129[a] (McKinney 2019); and then citing Passo v. MTA Bus Co., 129 A.D.3d 481, 481, 13 N.Y.S.3d 4, 4 (1st Dep't 2015)).

93. *Richter*, 166 A.D.3d at 696, 87 N.Y.S.3d at 186.

94. 164 A.D.3d 1642, 1643, 84 N.Y.S.3d 293, 294 (4th Dep't 2019).

95. *Id.* at 1643, 84 N.Y.S.3d at 294 (first citing Tate v. Brown, 125 A.D.3d 1397, 1398–99, 3 N.Y.S.3d 826, 828 (4th Dep't 2015); and then citing Mata v. Gress, 17 A.D.3d 1058, 1059, 794 N.Y.S.2d 239, 240 (4th Dep't 2005)).

rear-end collision because the lead vehicle suddenly came to a stop at an intersection because the proof showed the traffic light at the intersection had turned yellow.[96] In this situation, the driver should have anticipated the stop. Similarly, the Second Department in *Arslan v. Costello* found the rear driver's explanation for his collision with the vehicle in front of his vehicle deficient where the sudden stop was in heavy, stop-and-go traffic.[97]

The common law presumption of receipt was involved in *Sanders v. 210 North 12th Street, LLC*.[98] At issue in this slip and fall action was whether spoliation sanctions based on the defendant building owner's failure to preserve surveillance video footage taken on the date of the accident were warranted.[99] The plaintiff claimed his attorney had mailed a letter to the defendant shortly after the accident, requesting that defendant preserve all surveillance tapes in its possession showing the location of the accident for 6 hours before and 2 hours after.[100] Although the defendant denied receiving the letter, the plaintiff argued he was entitled to rely on the presumption of receipt and thus defendant must be charged with receiving the letter.[101]

The Appellate Division, Second Department, noted that the plaintiff on his sanctions application could potentially rely upon the presumption of receipt to establish a critical part of his application, namely, that the defendant had been put on notice to preserve the surveillance videos in its possession.[102] That presumption provides that proof of the proper mailing of a letter gives rise to a presumption that it was received by the addressee.[103] However, the plaintiff could not invoke the privilege to

96. 172 A.D.3d 995, 997, 101 N.Y.S.3d 170, 172 (2d Dep't 2019) (citing Tumminello v. City of New York, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739, 741 (2nd Dep't 2017)).

97. 164 A.D.3d 1408, 1409–10, 84 N.Y.S.3d 229, 231 (2d Dep't 2018) (first quoting Waide v. ARI Fleet, LT, 143 A.D.3d 975, 976 (2nd Dep't 2016); and then citing Taing v. Drewery, 100 A.D.3d 740, 741, 954 N.Y.S.2d 175, 177 (2nd Dep't 2012)).

98. 171 A.D.3d 966, 966, 98 N.Y.S.3d 118, 119 (2d Dep't 2019).

99. *Id.* at 968, 98 N.Y.S.3d at 120.

100. *Id.*

101. *Id.* at 969, 98 N.Y.S.3d at 121.

102. *Id.* (first citing Tanner v. Bethpage Union Free Sch. Dist., 161 A.D.3d 1210, 1211, 78 N.Y.S. 3d 443, 434 (2d Dep't 2018); then citing Aponte v. Clove Lakes Health Care & Rehab. Ctr., Inc., 153 A.D.3d 593, 594, 59 N.Y.S. 750, 751 (2d Dep't 2017); then citing Golan v. N. Shore-Long Island Jewish Health Sys., Inc., 147 A.D.3d 1031, 1033–34, 48 N.Y.S.3d 216, 217 (2d Dep't 2017); and then citing Bach v. City of New York, 33 A.D.3d 544, 545, 827 N.Y.S.2d 2, 3 (2d Dep't 2006)).

103. *See* Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829, 386 N.E.2d 1085, 1086, 414 N.Y.S.2d 117, 118 (1978) (first citing News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214, 176 N.E. 169, 170 (1931); then citing William Gardam & Son v. Batterson, 198 N.Y. 175, 178, 91 N.E. 371, 372 (1910); and then citing JEROME PRINCE, RICHARDSON ON EVIDENCE § 3-128, at 77–79 (11th ed. 1995)).

support its cause as the plaintiff had failed to establish the presumption's foundational elements.[104] In this regard, the court noted that the plaintiff's foundational proof was only an affirmation of its attorney stating the letter was sent.[105] This proof was patently insufficient as it was "unsupported by someone with personal knowledge of the mailing of the letter or proof of standard office practice or procedure designed to ensure that the letter was properly addressed and mailed."[106]

Sanders teaches an important lesson, namely, the presumption of receipt that attaches to letters duly addressed and mailed requires factual proof by one with knowledge of the standard office practice regarding mailing to establish the presumption of receipt.[107] A party's attorney who has no knowledge of that office practice is certainly not competent to establish the foundation, and a bald assertion that the letter was sent hardly qualifies as foundational proof.[108]

B. Res Ipsa Loquitur

The doctrine of *res ipsa loquitur* is a rule of evidence which, when applicable, allows a jury to establish a *prima facie* case of the defendant's negligence from the mere occurrence of an event and the defendant's relation to that accident.[109] To establish a *prima facie* case of negligence under the doctrine a plaintiff must establish that: (1) the event is of a kind that ordinarily does not occur absent negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the plaintiff did not voluntarily create or contribute to the event.[110] The establishment of these elements was in issue in three appellate division decisions that warrant discussion.[111]

104. *Id.* at 829–30, 386 N.E.2d at 1086 (citing Trusts & Guar. Co. v. Barnhardt, 270 N.Y. 350, 354–55, 1 N.E.2d 459, 461–62 (1936)).

105. *Sanders*, 171 A.D.3d at 969, 98 N.Y.S.3d at 121 (first citing Long Island Sports Dome v. Chubb Custom Ins. Co., 23 A.D.3d 441, 442, 807 N.Y.S.2d 594, 595 (2d Dep't 2005); then citing Residential Holding Corp. v. Scottsdale Ins. Co., 286 A.D.2d 679, 679, 729 N.Y.S.2d 776, 777 (2d Dep't 2001); and then citing Washington v. St. Paul Surplus Lines Ins. Co., 200 A.D.2d 617, 618, 606 N.Y.S.2d 726, 727 (2d Dep't 1994)).

106. *Id.*

107. *Id.*

108. *Id.*

109. *See* Michael J. Hutter, *Evidence, 2002-2003 Survey of New York Law*, 54 SYRACUSE L. REV. 1075, 1076–82 (2004).

110. *See* James v. Wormuth, 21 N.Y.3d 540, 546, 997 N.E.2d 133, 136, 974 N.Y.S.3d 308, 311 (2013); Dermatossian v. N.Y.C. Transit Auth., 67 N.Y.2d 219, 226, 492 N.E.2d 1200, 1203, 501 N.Y.S.2d 784, 788 (1986).

111. Wilkins v. W. Harlem Grp. Assistance, Inc., 167 A.D.3d 414, 415, 90 N.Y.S.3d 21, 22 (1st Dep't 2018); Dilligard v. City of New York, 170 A.D.3d 955, 956, 96 N.Y.S.3d 306,

In *Wilkins v. West Harlem Group Assistance, Inc.*, the Appellate Division, First Department, addressed whether there were questions of fact present as to all three elements.[112] The plaintiff was using a locker room on premises owned by defendant.[113] When he attempted to close a window that he had previously opened, he used a "little bit more force than [he] did when [he] lifted it."[114] As the window closed, it shook a bit and "then the whole window structure came out and crashed over the plaintiff's head."[115] The defendant moved for summary judgment dismissing plaintiff's negligence action on the grounds that it lacked notice of the dangerous condition and the doctrine of *res ipsa loquitur* was inapplicable.[116] The supreme court granted the motion on both grounds.[117]

The First Department reversed, finding the plaintiff had established by his proof an issue of fact as to the applicability of the doctrine.[118] Initially, the court held that "common experience" dictates that a window being closed does not simply fall out absent negligence.[119] The court then found the exclusivity element was sufficiently established by the plaintiff's proof that the defendant owned the premises and had continuing access to the window structure, and the fact that others, such as the plaintiff, had access to the window did not defeat the establishment of that element.[120] Lastly, the court held a question of fact was present as to whether the plaintiff did something to contribute to the window falling on him, a conclusion based upon the plaintiff's admission that he used more force than usual in closing the window.[121]

In *Dilligard v. City of New York*, the plaintiff, a public school teacher employed by defendant New York City, was injured when a faceplate of an overhead air-conditioning unit in her classroom fell on her head.[122] The faceplate fell after a student "stormed out" of her classroom,

308–09 (2d Dep't 2019); Greater Binghamton Dev., LLC v. Stellar 83 Court, LLC, 173 A.D.3d 1512, 1512, 104 N.Y.S.3d 377, 378 (3d Dep't 2019).

112. 167 A.D.3d at 415, 90 N.Y.S.3d at 22.

113. *Id.* at 414, 90 N.Y.S.3d at 22.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Wilkins*, 167 A.D.3d at 414, 90 N.Y.S.3d at 22.

118. *Id.* at 414–15, 90 N.Y.S.3d at 22.

119. *Id.* at 415, 90 N.Y.S.3d at 22.

120. *Id.* at 415, 90 N.Y.S.3d at 23 (first quoting Dawson v. Nat'l Amusements, Inc., 259 A.D.2d 329, 330, 687 N.Y.S.2d 19, 20 (1st Dep't 1999); and then citing Singh v. United Cerebral Palsy of N.Y.C., Inc., 72 A.D.3d 272, 277, 896 N.Y.S.2d 22, 26 (1st Dep't 2010)).

121. *Id.*

122. 170 A.D.3d 955, 955, 96 N.Y.S.3d 306, 308 (2d Dep't 2019).

"slamming" the door behind her.[123] In her action as alleged against the Department of Education, plaintiff moved for partial summary judgment on liability, invoking the *res ipsa loquitur* doctrine.[124]

The Second Department affirmed the supreme court's denial of her motion.[125] While noting that summary judgment on liability can be granted to a plaintiff based on *res ipsa* when the inference of negligence is "inescapable,"[126] the plaintiff's proof did not establish as a matter of law a sufficiently strong case to warrant its application.[127] Rather, the proof in the record only established triable issues of fact for the invocation of *res ipsa*.[128] As to the first element, the court noted that although the occurrence of a faceplate falling off an air conditioner is an event of a kind that ordinarily does not occur without negligence, the defendants raised a triable issue of fact as to that element by their proof which showed the faceplate could have fallen because of the slamming of the door and not as a result of any negligence on their part.[129] As to the exclusivity element, the defendants raised a triable issue of fact as to whether they exercised the requisite exclusive control over the air conditioning unit by their proof that outside contractors were responsible for the repairs and installations of air conditioning units in the school.[130] In this regard, the court noted that the element is not established "when third-party contractors have access to an instrumentality causing injuries."[131]

In *Greater Binghamton Development, LLC v. Stellar 83 Court, LLC*, plaintiff's five-story building sustained extensive water and fire damage as a result of a fire that occurred in an adjacent building.[132] The fire was so intense that it resulted in the building collapsing, with its remains

123. *Id.*

124. *Id.* at 956, 96 N.Y.S.3d at 308.

125. *Id.* at 957, 96 N.Y.S.3d at 309.

126. *Id.* at 956, 96 N.Y.S.3d at 309 (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)).

127. *Dilligard*, 170 A.D.3d at 956, 96 N.Y.S.3d at 309 (citing Imhotep v. State, 298 A.D.2d 558, 559, 750 N.Y.S.2d 87, 87 (2d Dep't 2002)).

128. *Id.* (citing Imhotep, 298 A.D.2d at 559, 750 N.Y.S.2d at 87).

129. *Id.* (first citing Matsur v. N.Y.C. Transit Auth., 66 A.D.3d 848, 849, 888 N.Y.S.3d 531, 533 (2d Dep't 2009); then citing Imhotep, 298 A.D.2d at 559, 750 N.Y.S.2d at 87; and then citing Bonventre v. Max, 229 A.D.2d 557, 557, 645 N.Y.S.2d 867, 868 (2d Dep't 1996)).

130. *Id.* at 957, 96 N.Y.S.3d at 309.

131. *Id.* (first citing Brennan v. Wappingers Cent. Sch. Dist., 164 A.D.3d 640, 641–42, 83 N.Y.S.3d 260, 262 (2d Dep't 2018); and then citing Lococo v. Mater Cristi Catholic High Sch., 142 A.D.3d 590, 591, 37 N.Y.S.3d 134, 136 (2d Dep't 2016)).

132. 173 A.D.3d 1512, 1512, 104 N.Y.S.3d 377, 378 (3d Dep't 2019). The author represented the plaintiff on the appeal in the Third Department.

ending up in its basement.[133] The fire marshal was unable to reach a conclusion as to the cause of the fire due to extensive structural damage to the building.[134] While he was able to establish the fire's point of origin, the upper floors of the building, that area of origin did not exist anymore, thereby precluding any further investigation.[135] The plaintiff commenced a negligence action against the owner of the building and several contractors who were involved in the renovation of the building.[136] When the defendants moved for summary judgment dismissing the complaint, the plaintiff sought to raise an inference of the defendant's negligence as to the cause of the fire by its invocation of *res ipsa*.[137]

At issue on the appeal from the supreme court's grant of the motion was whether *res ipsa* could be invoked in the circumstances presented, namely, a fire in which all physical evidence relating to a cause of the fire was destroyed in the fire.[138] The Third Department held that *res ipsa* could still be invoked but only upon a showing that the "probability of other [non-negligent] causes was so reduced that defendant['s] negligence was more likely than not to have caused the injury."[139] The plaintiff failed to make that showing as it proffered no expert testimony to eliminate the potential non-negligent causes.[140] While the plaintiff was unable to prove its case through no fault of its own, *res ipsa* was nonetheless inapplicable.[141]

C. Noseworthy

Pursuant to the rule established in *Noseworthy v. City of New York*, a plaintiff in cases where the alleged negligent act or omission of the defendant resulted in death is held to a lighter burden of persuasion in establishing his or her right to recover after the plaintiff had introduced some evidence of the defendant's negligence.[142] This rule does not lower

133. *Id.* at 1513, 104 N.Y.S.3d at 379.

134. *Id.*

135. *Id.*

136. *Id.* at 1512, 104 N.Y.S.3d at 378.

137. *Greater Binghamton Dev., LLC*, 173 A.D.3d at 1512, 104 N.Y.S.3d at 378.

138. *Id.*

139. *Id.* at 1513, 104 N.Y.S.3d at 379 (quoting 92 Court St. Holding Corp. v. Monnet, 106 A.D.3d 1404, 1407, 966 N.Y.S.2d 549, 553 (3d Dep't 2013)) (first citing Fontanelli v. Price Chopper Operating Co., 89 A.D.3d 1176, 1178, 931 N.Y.S.2d 800, 802 (3d Dep't 2011); then citing Schultheis v. Pristouris, 45 A.D.2d 864, 865, 358 N.Y.S.2d 551, 552 (2d Dep't 1974); and then citing Cooke v. Bernstein, 45 A.D.2d 497, 500, 359 N.Y.S.2d 793, 797 (1st Dep't 1974)).

140. *Id.* at 1513, 104 N.Y.S.3d at 379.

141. *Id.* at 1514, 104 N.Y.S.3d at 379.

142. 298 N.Y. 76, 80, 80 N.E.2d 744, 745 (1948).

the standard of proof, which remains proof by a preponderance of the evidence, but instead allows the jury to give more weight to circumstantial evidence "because the more direct and proper source of this evidence no longer exists."[143] The *Noseworthy* jury charge, as set forth in PJI 1:61, explains this lesser burden of persuasion.[144]

A recognized limitation of the *Noseworthy* rule—the charge is inapplicable "where the plaintiff and defendant have equal access to the facts surrounding the decedent's death,"[145]—was thoroughly explored by the Appellate Division, Third Department, in *Tyrell v. Pollak*.[146] William Tyrell (decedent) was found unconscious at the base of an exterior staircase leading from residential property owned by defendant.[147] Three months later, the decedent commenced a negligence action, alleging that the defendant allowed the staircase "'to deteriorate and to remain in a deteriorated condition,' and that such negligent conduct caused decedent to fall."[148] Shortly thereafter, the decedent died as a result of the injuries he had sustained and the plaintiff was appointed as the administrator of his estate.[149]

At the trial of the action, the plaintiff relied entirely on circumstantial evidence to establish defendant's negligence as the proximate cause of decedent's alleged fall.[150] Such reliance was the result of the absence of any witnesses to the fall and, although decedent had made some statements regarding the fall to emergency responders, his injures and subsequent death rendered him unable to give testimony either at a deposition or trial.[151] The evidence presented established the defendant had allowed the staircase to deteriorate and as a result the staircase had numerous deficiencies and was in a general state of disrepair, and the area of the fall was poorly lit.[152] Additionally, the testimony of an upstairs tenant that she consistently swept concrete debris

143. *Id*. at 80, 80 N.E.2d at 745.

144. 1A N.Y. PJI–Civil 1:61 (2019).

145. Orloski v. McCarthy, 274 A.D.2d 633, 634, 710 N.Y.S.2d 691, 693 (3d Dep't 2000), *lv. den*. 95 N.Y.2d 767, 767, 740 N.E.2d 653, 653, 717 N.Y.S.2d 547, 547 (2000) (first citing Walsh v. Murphy, 267 A.D.2d 172, 172, 700 N.Y.S.2d 32, 33 (1st Dep't 1999); then citing Gayle v. City of New York, 256 A.D.2d 541, 542, 682 N.Y.S.2d 426, 427 (2d Dep't 1998); and then citing Wright v. N.Y.C. Hous. Auth., 208 A.D.2d 327, 332, 624 N.Y.S.2d 144, 147 (1st Dep't 1995)).

146. 163 A.D.3d 1232, 1236, 80 N.Y.S.3d 706, 709–10 (3d Dep't 2018).

147. *Id*. at 1232, 80 N.Y.S.3d at 707.

148. *Id*.

149. *Id*.

150. *Id*. at 1233, 80 N.Y.S.3d at 707–08.

151. *Tyrell*, 163 A.D.3d at 1233, 80 N.Y.S.3d at 707.

152. *Id*. at 1234, 80 N.Y.S.3d at 708.

off the stairs was presented as well as the testimony of a code enforcement official that concrete pieces on the stairs posed a tripping hazard to anyone who traversed the stairs.[153] The *Noseworthy* charge was given to the jury.[154] The jury returned a verdict in favor of plaintiff and awarded substantial damages.[155]

The Third Department affirmed the judgment entered on the verdict, concluding, *inter alia*, that the trial court did not err in giving the *Noseworthy* charge.[156] In so holding, the court rejected the defendant's argument that the charge was not warranted because the plaintiff and the defendant had equal access to the underlying facts.[157] The court carefully explained this conclusion, noting that the defendant had used various ambiguous statements made by decedent regarding what happened to him to the emergency responders in an effort to show the fall was not the result of any negligence on its part.[158] As the decedent died before he had any opportunity to explain these statements, and what he did say at the time that could be viewed as explaining in part these statements was inadmissible hearsay, the plaintiff was relegated to trying to refute the defendant's characterizations of the admitted statements.[159] Additionally, the court pointed to the fact that a photograph depicting blood on a particular stair was apparently taken and subsequently lost by an investigator hired by the defendant.[160] Under these circumstances, the court readily concluded the plaintiff and the defendant were not on "equal footing" and thus there was no error in giving the *Noseworthy* charge.[161]

The Third Department's analysis is commendable, based as it is upon the fairness of the trial process. It shows the "equal footing" limitation will not be invoked where a defendant is able, as defendant was in the case before it, to make arguments before the jury that the plaintiff is in no position to directly respond to.[162]

153. *Id.*

154. *Id*. at 1235, 80 N.Y.S.3d at 709.

155. *Id*. at 1233, 80 N.Y.S.3d at 707.

156. *Tyrell*, 163 A.D.3d at 1235, 80 N.Y.S.3d at 709.

157. *Id.* (first quoting Orloski v. McCarthy, 274 A.D.2d 633, 634, 710 N.Y.S.2d 691, 693 (3d Dep't 2000); then citing Rockhill v. Pickering, 276 A.D.2d 1002, 1003, 714 N.Y.S. 598, 599 (3d Dep't 2000); and then citing Gayle v. City of New York, 256 A.D.2d 541, 542, 682 N.Y.S.2d 426, 427 (2d Dep't 1998)).

158. *Id*. at 1236, 80 N.Y.S.3d at 710.

159. *Id.*

160. *Id.*

161. *Tyrell*, 163 A.D.3d at 1236, 80 N.Y.S.3d at 710 (citing Noseworthy v. City of New York, 298 N.Y. 76, 80, 80 N.E.2d 744, 745 (1948)).

162. *See id*.

D. Missing Witness Adverse Inference

The Court of Appeals in *People v. Smith* revisited the issue of when the missing witness instruction is appropriate.[163] Substantial precedent had established that a party's failure to call an available witness permits the jury to draw an adverse inference that the witness, if called, would be unfavorable to that party provided certain preconditions were met.[164] Those preconditions are: (1) the witness's knowledge is material to an issue in the trial; "(2) the witness is expected to give non-cumulative testimony; (3) the witness is under the control of the party against whom the charge is sought; and (4) the witness is available to that party."[165]

In *Smith*, the Court of Appeals addressed the respective burdens imposed on the parties when a missing witness instruction is sought.[166] Prior to *Smith*, all four appellate division departments followed the same burden shifting analysis, which required the party seeking the instruction to make a prima facie showing that an uncalled witness was knowledgeable about a material issue in the action and would be expected to give non-cumulative testimony favorable to the opposing party; and the opposing party, to avoid the instruction, would need to establish the witness is unavailable to testify, there is no control over the witness, the witness is not knowledgeable about the issue, the issue is not material, or the testimony would be cumulative.[167]

The issue before the court in *Smith* involved only the cumulative evidence precondition.[168] The Fourth Department below had split three to two as to whether imposing the burden upon the party seeking the

163. People v. Smith, 33 N.Y.3d 454, 456, 128 N.E.3d 649, 651, 104 N.Y.S.3d 572, 574 (2019) (citing People v. Gonzalez, 68 N.Y.2d 424, 427, 502 N.E.2d. 583, 586, 509 N.Y.S.2d 796, 799 (1986)).

164. *See, e.g.*, People v. Savinon, 100 N.Y.2d 192, 196, 791 N.E.2d 401, 403, 761 N.Y.S.2d 144, 146 (2003); People v. Keen, 94 N.Y.2d 533, 539, 728 N.E.2d 979, 982, 707 N.Y.S.3d 380, 383 (2000); *Gonzalez*, 68 N.Y.2d at 427, 502 N.E.2d at 586, 509 N.Y.S.2d at 799. (While the Court of Appeals has not stated the exact nature of the adverse inference, courts follow in civil actions PJI 1:75 (1A N.Y. PJI–Civil 1:75 (2019)) and in criminal actions the Criminal Model Jury Charge covering missing witnesses. (CJI2d ("A Party's Failure to Call a Witness")).

165. *See* Devito v. Feliciano, 22 N.Y.3d 159, 165–66, 1 N.E.3d 791, 796, 978 N.Y.S.3d 717, 722 (2013) (citing *Savinon*, 100 N.Y.2d 192, 197–98, 791 N.E.2d 401, 404, 761 N.Y.S.2d 144, 147, People v. Macana, 84 N.Y.2d 173, 177, 639 N.E.2d 13, 615 N.Y.S.2d 646, 657–58 (1994)); PRINCE, *supra* note 103, § 3-140, at 89–91.

166. *Smith*, 33 N.Y.3d at 460, 128 N.E.3d at 654, 104 N.Y.S.3d at 576.

167. Michael J. Hutter, *People v. Smith: Missing Witness Charge as Applied in Criminal and Civil Actions Revisited*, N.Y.L.J. (July 31, 2019), https://www.law.com/newyorklawjournal/2019/07/31/people-v-smith-missing-witness-charge-as-applied-in-criminal-and-civil-actions-revisited/).

168. *Id.*

instruction to establish that the testimony of the uncalled witness would be non-cumulative.[169] The majority continued to align itself with the other departments[170] but the dissenting justices, Edward Carni and Steven Lindley, in an opinion authored by Justice Carni, were of the view that placing the burden on the requesting party was inconsistent with Court of Appeals precedent addressing the preconditions for the instruction.[171]

The Court of Appeals agreed with the dissenters.[172] In its unanimous opinion, the Court rejected the appellate division decisions placing the initial non-cumulative evidence precondition burden on the proponent of the instruction as inconsistent with its precedent.[173] It noted in further support of its rejection of the departments' points that it is more appropriate to impose the burden on the opposing party as "[t]he proponent of the charge typically lacks the information necessary to know what the uncalled witness would have said and, thus, whether the testimony would have been cumulative. The party opposing the charge is in a superior position to demonstrate that the uncalled witness's testimony would be cumulative."[174]

Upon its conclusion that the party opposing the instruction has the burden of showing that the uncalled witness's testimony would be cumulative, the Court then held on the record before it the People failed to meet this burden in this assault prosecution.[175] It noted that the uncalled witness was knowledgeable about the issue relating to the identification of the drive-by shooter, and his testimony would not have been trivial or cumulative as the shooting victim's testimony was inconsistent as to her designation of the shooting incident and what the shooter was wearing.[176] Of significance, the Court commented that testimony will be viewed as non-cumulative when it may "contradict or add" to key witness's disputed testimony, as here.[177]

169. People v. Smith, 162 A.D.3d 1686, 1687, 80 N.Y.S.3d 577, 579–80 (4th Dep't 2018).

170. *Id.*

171. *Id*. at 1690, 1692–93, 80 N.Y.S.3d at 581, 583–84 (Carni & Lindley, J.J., dissenting).

172. People v. Smith, 33 N.Y.3d 454, 461, 128 N.E.3d 649, 655, 104 N.Y.S.3d 572, 577 (2019).

173. *Id*. at 459, 128 N.E.3d at 653–54, 104 N.Y.S.3d at 576 (first citing People v. Chestnut, 149 A.D.3d 772, 773, 50 N.Y.S.3d 549, 550 (2d Dep't 2017); then citing People v. McBride, 272 A.D.2d 200, 200, 708 N.Y.S.2d 18, 19 (1st Dep't 2000); and then citing People v. Townsley, 240 A.D.2d 955, 958, 659 N.Y.S.2d 906, 908 (3d Dep't 1997)).

174. *Id*. at 459–60, 128 N.E.3d at 654, 104 N.Y.S.3d at 576.

175. *Id*. at 460, 128 N.E.3d at 654, 104 N.Y.S.3d at 577.

176. *Id*. at 460–61, 128 N.E.3d at 654–55, 104 N.Y.S.3d at 577 (quoting People v. Rodriguez, 38 N.Y.2d 95, 101, 341 N.E.2d 231, 235, 378 N.Y.S.2d 665, 670 (1975)).

177. *Smith*, 33 N.Y.3d 4 at 461, 128 N.E.3d at 655, 104 N.Y.S.3d at 577 (quoting People v. Almodovar, 62 N.Y.2d 126, 133, 464 N.E.2d 463, 467, 476 N.Y.S.2d 95, 99 (1985)).

One other decision, *Dacaj v. New York City Transit Authority*, merits discussion.[178] In this decision, the Appellate Division, First Department, addressed the issue as to whether the instruction may be given in the situation where a party fails to call as a witness the expert disclosed in that party's expert witness disclosure made pursuant to CPLR 3101(d)(1)(i).[179] In *Dacaj*, a personal injury action arising out of the plaintiff's fall on a stairway at the defendant's subway station, the defendant served expert disclosures with regard to an orthopedist and a radiologist.[180] However, at trial, these experts were not called to testify at trial by the defendant, and the trial court gave a missing witness instruction with respect to both experts.[181] The court held that the instruction was properly given.[182] As to the orthopedist, the court rejected the defendant's argument that his testimony would have been cumulative to the testimony of its expert neurologist since the plaintiff claimed orthopedic injuries and that expert could not offer any orthopedic opinions.[183] With respect to the radiologist, the court rejected the defendant's argument that his testimony would not have related to a material issue, noting that his testimony would have borne on the presence of degenerative disc disease in the plaintiff's cervical spine, which went to the issue of causation and damages.[184]

The fact that the "missing witnesses" were experts, and not lay witnesses did not at all deter the court from concluding that the missing witness instructions were proper.[185] In the view of the court, no blanket exclusions from the application of the missing witness instruction were warranted.[186] In so holding, the court agreed with precedent from the

178. 170 A.D.3d 561, 97 N.Y.S.3d 19 (1st Dep't 2019).

179. *Id*. at 562, 97 N.Y.S.3d at 20–21 (first citing DeVito v. Feliciano, 22 N.Y.3d 159, 165–66, 1 N.E.3d 791, 795–96, 978 N.Y.S.2d 717, 721–22 (2013); then citing People v. Gonzalez, 68 N.Y.2d 424, 427–31, 502 N.E.2d 583, 509 N.Y.S.2d 796 (1986)); N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 2019)). When a party has failed to make a disclosure of an expert witness the party called at trial to testify, the party may be precluded from using the expert at trial. DAVID D. SIEGEL & PATRICK M. CONNERS, NEW YORK PRACTICE § 348A, at 643–44 (2018).

180. Dacaj v. N.Y.C. Transp. Auth., No. 151523/12, 2017 N.Y. Slip Op. 30650(U), at 2–3 (Sup. Ct. N.Y. Cty. Apr. 6, 2017).

181. *Dacaj*, 170 A.D.3d at 562, 97 N.Y.S.3d at 20 (first citing *DeVito*, 22 N.Y.3d at 165–66, 1 N.E.3d 795–96, 978 N.Y.S.2d at 721–22; and then citing *Gonzalez*, 68 N.Y.2d at 427–31, 502 N.E.2d 583, 509 N.Y.S.2d 796).

182. *Id*.

183. *Id*. at 562, 97 N.Y.S.3d at 20–21.

184. *Id*. at 562, 97 N.Y.S.3d at 21.

185. *See id*.

186. *See Dacaj*, 170 A.D.3d at 562, 97 N.Y.S.3d at 20.

Appellate Division, Third Department.[187] As a result of this precedent, if a party decides not to call as a witness at trial an expert the party has disclosed, that party must be prepared to explain why the expert was not called to testify within the framework established in *People v. Smith*.[188]

E. Spoliation Adverse Inference

Spoliation of evidence occurs when a party negligently or intentionally alters, loses or destroys evidence.[189] In 2015, the Court of Appeals held in *Pegasus Aviation I, Inc. v. Varig Logistica S.A.* that under the common law the party responsible for the spoliation of key evidence may be sanctioned under CPLR 3126.[190] For a sanction to be imposed, the moving party must establish that: (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed with a "culpable state of mind," which may involve either negligence or willfulness; and (3) the evidence was relevant to the moving party's claim or defense.[191]

Numerous spoliation sanction opinions were issued during the *Survey* year involving the application of *Pegasus's* elements for an award of sanctions, and the sanctions available. Several are worth discussion.

In *Gitman v. Martinez*, the Appellate Division, Third Department, addressed the issue of when a party's obligation to preserve evidence arises.[192] The plaintiff was involved in a multi-vehicle accident while traveling on Interstate Eighty-Seven.[193] The accident occurred when the plaintiff's vehicle was struck from behind by a tractor-trailer, which had

187. *See, e.g.*, Mason v. Black & Decker, Inc., 274 A.D.2d 622, 623, 710 N.Y.S.2d 694, 696 (3d Dep't 2000), *lv. denied*, 95 N.Y.2d 770, 745 N.E.2d 393, 722 N.Y.S.2d 473 (2000); Goverski v. Miller, 282 A.D.2d 789, 791, 723 N.Y.S.2d 526, 528 (3d Dep't 2001).

188. Greater Binghamton Dev., LLC v. Stellar 83 Court LLC, 173 A.D.3d 1512, 1512–13, 104 N.Y.S.3d 377, 378–79 (3d Dep't 2019).

189. Metlife Auto & Home v. Joe Basil Chevrolet, Inc., 303 A.D.2d 30, 33–34, 753 N.Y.S.2d 272, 274–75 (4th Dep't 2002), *aff'd*. 1 N.Y.3d 478, 483, 807 N.E.2d 865, 868, 775 N.Y.S.3d 754, 757 (2004).

190. 26 N.Y.3d 543, 551, 46 N.E.3d 604, 605, 26 N.Y.S.3d 218, 222 (2015) (first citing Ortega v. City of New York, 9 N.Y.3d 69, 76, 876 N.E.2d 1189, 1192, 845 N.Y.S.2d 773, 776 (2007); and then citing N.Y. C.P.L.R. 3126 (McKinney 2019)). For a discussion of *Pegasus*, *see* Patricia A. Lynn-Ford, *2015–16 Survey of New York Law: Evidence*, 67 SYRACUSE L. REV. 949, 980–83 (2017).

191. *Pegasus*, 26 N.Y.3d at 547, 46 N.E.3d at 602, 26 N.Y.S.3d at 219 (first quoting Voom HD Holdings LLC v. EchoStar Satellite LLC, 93 A.D.3d 33, 45, 939 N.Y.S.2d 321, 330 (1st Dep't 2012); and then citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)).

192. 169 A.D.3d 1283, 1286, 95 N.Y.S.3d 427, 431 (3d Dep't 2019).

193. *Id.* at 1283, 95 N.Y.S.3d at 429.

been struck from behind by a tractor-trailer.[194] The plaintiff sued the drivers and owners of both tractor-trailers and they asserted cross-claims.[195] At the close of discovery, the owner of the rear-most tractor-trailer moved for an adverse inference charge against the owner of the other tractor-trailer based on that the defendant's spoliation of data from electronic recording devices in its vehicle.[196] The data on the recorder was overwritten when the tractor-trailer was placed back into service two weeks after the accident.[197] The Third Department held that although the data was destroyed by the overwriting before plaintiff had commenced her action or any demand for production or preservation of the data had been made, sanction for spoliation would still be warranted as the data would have been relevant to the determining of the sequence of the collisions and defendant should have reasonably anticipated that the multi-vehicle accident would likely result in litigation.[198] Thus, an adverse inference charge against the defendant was warranted at trial.[199]

The Fourth Department addressed the "culpability" element imposed by *Pegasus* before a sanction could be imposed in *Estate of Smalley v. Harley-Davidson Motor Company Group, LLC*.[200] The plaintiffs, husband and wife, were injured when the motorcycle the husband was operating, with his wife seated behind him, unexpectedly lost power, resulting in it flipping over and throwing them to the ground.[201] The plaintiffs commenced a negligence action against defendant, alleging the motorcycle was defective.[202] Prior to trial, the defendant sought an adverse inference spoliation charge based upon the destruction of the motorcycle.[203] The wife had given permission to the plaintiffs' insurance company to salvage the motorcycle two months after the accident.[204] At the time, she was still in a hospital and her husband

194. *Id.*

195. *Id.*

196. *Id.* at 1284, 95 N.Y.S.3d at 429–30.

197. *Gitman*, 169 A.D.3d at 1286–87, 95 N.Y.S.3d at 432.

198. *Id.* at 1287, 95 N.Y.S.3d at 432 (first citing Simoneit v. Mark Cerrone, Inc., 122 A.D.3d 1246, 1248, 996 N.Y.S.2d 810, 812 (4th Dep't 2014); and then citing Martinez v. Paddock Chevrolet, Inc., 85 A.D.3d 1691, 1692, 927 N.Y.S.2d 489, 490 (4th Dep't 2011)).

199. *Id.* (citing Cioffi v. S.M. Foods, Inc., 142 A.D.3d 520, 526, 36 N.Y.S.3d 475, 482 (2d Dep't 2016)).

200. 170 A.D.3d 1549, 1550, 96 N.Y.S.3d 402, 404 (4th Dep't 2019) (first citing Duluc v. AC & L Food Corp., 119 A.D.3d 450, 451, 990 N.Y.S.2d 24, 26 (1st Dep't 2014); and then citing Burke v. Queen of Heaven R.C. Elementary Sch., 151 A.D.3d 1608, 1608–09, 58 N.Y.S.3d 757, 759 (4th Dep't 2017)).

201. *Id.* at 1550, 96 N.Y.S.3d at 404.

202. *See id.* at 1549–1550, 96 N.Y.S.3d at 404.

203. *See id.* at 1550, 96 N.Y.S.3d at 404.

204. *Id.*

was in a coma.[205] The salvaging of the motorcycle occurred "well before" the plaintiffs had received a recall notice for the motorcycle from the defendant that prompted their action.[206] The court held the trial court did not err in refusing to give a spoliation charge as there was no evidence that the plaintiffs sought the destruction of the motorcycle with the intention of frustrating discovery.[207] Moreover, a spoliation charge was not warranted since "to the extent [defendant] was prejudiced" by reason of its inability to inspect the motorcycle, "plaintiffs were equally prejudiced."[208]

When spoliation of evidence is established, what will be a proper sanction? Generally, a trial court has broad discretion in determining what, if any, sanction should be imposed.[209] The nature and severity of the sanction depends on a number of factors, including but not limited to, the knowledge and intent of the spoliator, an explanation for the loss or destruction of the evidence and the degree of prejudice to the opposing party as a result of the loss or destruction of the evidence.[210]

In *Francis v. Mount Vernon Board of Education*, the Appellate Division, Second Department, addressed the issue on an appeal from the trial court's refusal to strike the defendant's answer as the sanction for its spoliation of evidence.[211] The plaintiff was injured "when he was picked up and dropped on his head by a fellow student at Mount Vernon High School."[212] He sued defendant to recover for his injuries, "alleging that it failed to provide adequate supervision."[213] The incident was video recorded on a surveillance camera at the high school, but could not be located after it had been viewed by the plaintiff, the police, and a school administrator after the accident.[214] According to the school principal, the "disappearance was accidental and a search had been conducted to locate

205. *Estate of Smalley*, 170 A.D.3d at 1550, 96 N.Y.S.3d at 404.

206. *Id*.

207. *Id*. at 1550–51, 96 N.Y.S.3d at 404 (citing O'Reilly v. Yavorskiy, 300 A.D.2d 456, 457, 755 N.Y.S.2d 81, 82 (2d Dep't 2002)).

208. *Id*. at 1550, 96 N.Y.S.3d at 404 (citing McLaughlin v. Brouillet, 289 A.D.2d 461, 461, 735 N.Y.S.2d 154, 155 (2d Dep't 2001)).

209. Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d 543, 551, 46 N.E.3d 601, 605, 26 N.Y.S.3d 218, 222 (2015) (citing Ortega v. City of New York, 9 N.Y.3d 69, 76, 876 N.E.2d 1189, 1192, 845 N.Y.S.2d 773, 776 (2007)).

210. *See id*. at 552–54, 46 N.E.3d at 605–07, 26 N.Y.S.3d at 222–24; citing 1A N.Y. PJI–Civil 1:77, Comment (2019).

211. 164 A.D.3d 873, 873, 83 N.Y.S.3d 637, 638 (2d Dep't 2018).

212. *Id.*

213. *Id.*

214. *Id.* at 874, 83 N.Y.S.3d at 639.

it."[215] The court held in the circumstances the "drastic sanction" of striking the answer was not warranted, as the plaintiff herself had viewed the video and she would still be able to prove her case despite the absence of the video.[216] The court's decision clearly indicates that the striking of an answer, or complaint, as a spoliation remedy may be appropriate only when the spoliation fatally compromises the party's ability to prove its claim or defense.[217] Whether a spoliation adverse inference charge would still be warranted was not in issue as the plaintiff did not pursue, alternatively, that remedy.[218]

Is spoliation of evidence present when a plaintiff in a motor vehicle action seeking to recover damages for injuries to her cervical spine as a result of the accident submits to elective surgery for those injuries without first submitting to an independent medical examination ("IME") defendants had requested? This issue was addressed by Bronx County Supreme Court Judge John Higgitt in *Martinez v. Nelson*.[219] Judge Higgitt initially found that "the condition of plaintiff's cervical spine was evidence that was capable of being spoliated" under the *Pegasus* standard.[220] He reached this result as he viewed the condition of the plaintiff's cervical spine to be a fact material to the litigation and discerned no reason why a body part in such circumstances could not be spoliated.[221] With this determination, Judge Higgitt then found defendants established "that plaintiff had an obligation to preserve the condition of her cervical spine at the time of its [surgical] alteration" by virtue of a preservation letter that was sent to her one month prior to her unannounced surgery, demanding that she appear for an IME prior to any surgery.[222] As to the culpability element, Judge Higgitt noted that at the

215. *Id.*

216. *Francis*, 164 A.D.3d at 874, 83 N.Y.S.3d at 639.

217. *See id.* (first quoting Utica Mut. Ins. Co. v. Berkoski Oil Co., 58 A.D.3d 717, 718, 872 N.Y.S.2d 166, 168 (2d Dep't 2009); and then quoting Peters v. Hernandez, 142 A.D.3d 980, 981, 37 N.Y.S.3d 443, 444 (2d Dep't 2016)).

218. *See id.* at 873, 83 N.Y.S.3d at 638 (recognizing the motion to strike).

219. 64 Misc. 3d 225, 226, 101 N.Y.S.3d 580, 581 (Sup. Ct. Bronx Cty. 2019).

220. *Id*. at 229, 101 N.Y.S.3d at 583 (first citing Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d 543, 547, 46 N.E.3d 601, 602, 26 N.Y.S.3d 218, 219 (2015); and then citing VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 45, 939 N.Y.S.2d 321, 330 (1st Dep't 2012)).

221. *Id.*

222. *Id.* at 230–31, 101 N.Y.S.3d at 584 (first citing *In re* N.Y.C. Asbestos Litig., 157 A.D.3d 564, 565, 69 N.Y.S.3d 622, 622 (1st Dep't 2018); then citing Moiorano v. JPMorgan Chase & Co., 124 A.D.3d 536, 536, 998 N.Y.S.2d 629, 629 (1st Dep't 2015); then citing Malouf v. Equinox Holdings, Inc., 113 A.D.3d 422, 422, 978 N.Y.S.2d 160, 161 (1st Dep't 2014); then citing Metlife Auto & Home v. Joe Basil Chevrolet, Inc., 1 N.Y.3d 478, 483, 807

very least, the plaintiff was negligent in proceeding with the surgery in the absence of any demonstrated immediate need for the surgery after receiving the defendant's request.[223] Notably, he also determined that her conduct could be viewed to be willful, which would trigger a rebuttable presumption that her cervical spine condition was relevant to the defense of the action, leading to an array of possible sanctions.[224] However, on the record before him, Judge Higgitt could not determine the plaintiff's state of mind and reserved that issue for determination after relevant discovery was conducted.[225]

III. RELEVANCE AND ITS LIMITS

A. Habit

New York law has long recognized that evidence of a person's habit or an organization's routine practice is admissible to prove that the person or organization acted in conformity with that habit on a particular occasion.[226] As stated by the Court of Appeals in *Halloran v. Virginia Chemicals, Incorporated*: "[E]vidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions" because "one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again."[227] Consistent with the enumerated policy for this rule, a habit or routine practice constitutes a deliberate and repetitive practice by a person or organization in complete control of

N.E.2d 865, 868, 775 N.Y.S.2d 754, 756–57 (2004); and then citing Elmaleh v. Vroom, 160 A.D.3d 557, 557, 72 N.Y.S.3d 432, 433 (1st Dep't 2018)).

223. *Id.* (citing 1A N.Y. PJI–Civil 2:10 (2019) (defining negligence)).

224. *Martinez*, 64 Misc. 3d at 231, 101 N.Y.S.3d at 584–85 (first citing *Pegasus Aviation*, 26 N.Y.3d at 550, 46 N.E.3d at 604, 26 N.Y.S.3d at 221; then citing Siras Partners LLC v. Activity Kuafu Hudson Yards LLC, 171 A.D.3d 680, 680, 100 N.Y.S.3d 218, 219 (1st Dep't 2019); then citing Arbor Realty Funding, LLC v. Herrick, Feinstein LLP, 140 A.D.3d 607, 609, 36 N.Y.S.3d 2, 5 (1st Dep't 2016); and then citing AJ Holdings Grp., LLC v. IP Holdings, LLC, 129 A.D.3d 504, 505, 11 N.Y.S.3d 55, 56 (1st Dep't 2015)).

225. *Id.* at 231, 101 N.Y.S.3d at 585.

226. 1A N.Y. PJI–Civil 1:71 (2019) (stating the so-called habit evidence charge derived from Court of Appeals precedent). *See, e.g.*, Halloran v. Va. Chems., Inc., 41 N.Y.2d 386, 392, 361 N.E.2d 991, 995–96, 393 N.Y.S.2d 341, 345–46 (1977); Beakes v. DaCunha, 126 N.Y. 293, 298, 27 N.E. 251, 252 (1891); *In re* Will of Kellum, 52 N.Y. 517, 520 (1873).

227. 41 N.Y.2d at 391, 361 N.E.2d at 995, 393 N.Y.S.2d at 345.

circumstances under which the practice occurs.[228] This habit evidence rule definition of habit was applied in three instructive decisions.[229]

In *Ortega v. Ting*, the plaintiff was struck by a vehicle operated by defendant while riding his bicycle.[230] At trial, the plaintiff testified that while he did not recall the accident, he did recall leaving work and getting on his bicycle with the intent of taking the route he usually took home.[231] In his testimony, the plaintiff detailed that route and explained that he took the same route every day, except for when he took the bus, and that the route had him traveling with traffic.[232] The defendant contradicted the plaintiff's travel direction, testifying that the plaintiff at the time of the accident was traveling against traffic.[233] Based on the plaintiff's testimony, the trial court charged the habit evidence rule.[234] "The jury returned a verdict in favor of the plaintiff on the issue of liability[ ]" and defendant appealed.[235]

The Appellate Division, Second Department, upheld the verdict, finding the verdict was not against the weight of the credible evidence as there was sufficient evidence from which the jury could conclude that defendant's negligence caused the plaintiff's injuries.[236] In so concluding, the court determined the jury could have reasonably credited plaintiff's

228. *See* Rivera v. Anilesh, 8 N.Y.3d 627, 634, 869 N.E.2d 654, 658, 838 N.Y.S.2d 478, 482 (2007); Ferrer v. Harris, 55 N.Y.2d 285, 294, 434 N.E.2d 231, 236, 449 N.Y.S.2d 162, 167 (1982).

229. *See, e.g.*, Ortega v. Ting, 172 A.D.3d 1217, 1218, 102 N.Y.S.3d 110, 112 (2d Dep't 2019) (first citing Gucciardi v. New Chopsticks House, Inc., 133 A.D.3d 633, 634, 19 N.Y.S.3d 80, 81 (2d Dep't 2015); then citing Greenberg v. N.Y.C. Transit Auth., 290 A.D.2d 412, 413, 736 N.Y.S.2d 73, 75 (2d Dep't 2002); and then citing Simion v. Franklin Ctr. for Rehab. & Nursing, Inc., 157 A.D.3d 738, 739, 69 N.Y.S.3d 64, 65 (2d Dep't 2018)); Rozier v. BTNH, Inc., 166 A.D.3d 1516, 1516, 87 N.Y.S.3d 770, 771 (4th Dep't 2018) (first citing Biesiada v. Suresh, 309 A.D.2d 1245, 1245, 764 N.Y.S.2d 739, 740 (4th Dep't 2003); and then citing Mancuso v. Koch, 74 A.D.3d 1736, 1737, 904 N.Y.S.2d 832, 835 (4th Dep't 2010)); People v. Megnath, 164 A.D.3d 834, 835, 79 N.Y.S.3d 557, 558 (2d Dep't 2018) (citing People v. Simmons, 39 A.D.3d 235, 236, 833 N.Y.S.2d 437, 438 (1st Dep't 2007)).

230. 172 A.D.3d at 1217, 102 N.Y.S.3d at 111.

231. *Id.* at 1217, 102 N.Y.S.3d at 112. Upon the plaintiff's medical proof that he had no memory of the accident as a result of the accident, the trial court gave a *Noseworthy* charge. *Id.* (citing Noseworthy v. City of New York, 298 N.Y. 76, 81, 80 N.E.2d 744, 746 (1948)).

232. *Id.*

233. *Id.* at 1217–18, 102 N.Y.S.3d at 112.

234. *Ortega*, 172 A.D.3d at 1217, 102 N.Y.S.3d at 112.

235. *Id.* at 1218, 102 N.Y.S.3d at 112.

236. *Id.* at 1218–19, 102 N.Y.S.3d at 112–13 (first citing Shellkopf v. Bernfeld, 162 A.D.3d 1086, 1086–87, 79 N.Y.S.3d 668, 669–70 (2d Dep't 2018); then citing Wallace v. City of New York, 108 A.D.3d 761, 761, 970 N.Y.S.2d 237, 238 (2d Dep't 2013); and then citing Barchella v. Moser, 156 A.D.2d 324, 325, 548 N.Y.S.2d 522, 523–24 (2d Dep't 1989)).

testimony as to his habit or routine practice.[237] Implicit in this conclusion was that the habit evidence charge was properly given.[238] Thus, the court was also concluding that the plaintiff's testimony as to practice could constitute a habit for purposes of the rule, and that the plaintiff's testimony that he took the same route every work day, except for those days when he took the bus, was sufficient to permit the jury to find that the plaintiff had such a habit.[239] Properly construed, *Ortega* demonstrates that habit evidence is admissible in negligence actions to establish a plaintiff's conduct, provided a plaintiff is in complete control of the circumstances in which it occurs and the conduct is not likely to vary from time to time depending on the circumstances, as in *Ortega*.[240]

In *Rozier v. BTNH, Inc.*, the Appellate Division, Fourth Department, upheld the giving of the habit evidence charge as requested by the defendant in a negligence action.[241] The plaintiff had commenced the action to recover for injuries he allegedly sustained when he slipped and fell in the defendant's parking lot.[242] The negligence claim was that defendant had not removed ice that had formed on the parking lot's surface.[243] To rebut this claim, the trial court permitted the defendant's maintenance staff to testify concerning their custom and habit with respect to snow and ice removal, and then based on that testimony gave

237. *Id.* at 1218, 102 N.Y.S.3d at 112 (first citing Gucciardi v. New Chopsticks House, Inc., 133 A.D.3d 633, 634, 19 N.Y.S.3d 80, 81 (2d Dep't 2015); then citing Greenberg v. N.Y.C. Transit Auth., 290 A.D.2d 412, 413, 736 N.Y.S.2d 73, 74–75 (2d Dep't 2002); and then citing Simion v. Franklin Ctr. for Rehab. & Nursing, Inc., 157 A.D.3d 738, 749, 69 N.Y.S.3d 64, 65 (2d Dep't 2018)).

238. *See id.* (finding reason to uphold the jury verdict in the plaintiff's testimony on habit or routine, holding the plaintiff to a lower degree of proof, thereby approving the use of the *Noteworthy* charge); *see* Schechter v. Klanfer, 28 N.Y.2d 228, 230, 269 N.E.2d 812, 814, 321 N.Y.S.2d 99, 101 (1971) (citing *Noseworthy*, 298 N.Y. at 80, 80 N.E.2d at 745) ("The rule providing when a plaintiff may prevail on a lesser degree of proof was best crystalized in *Noseworthy* . . . [where the court held] a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence[.]").

239. *Ortega*, 172 A.D.3d at 1218, 102 N.Y.S.3d at 112 (first citing *Gucciardi*, 133 A.D.3d at 634, 19 N.Y.S.3d at 81; then citing *Greenberg*, 290 A.D.2d at 413, 736 N.Y.S.2d at 74–75; and then citing *Simion*, 157 A.D.3d at 749, 69 N.Y.S.3d at 65).

240. *See id.* (finding that because the plaintiff was in complete control while riding his bicycle in the same manner he always did, plaintiff's habit evidence was sufficient to support his version of the events, he had not varied from his usual course); *see also Gucciardi*, 133 A.D.3d at 634, 19 N.Y.S.3d at 81 (first citing *Halloran*, 41 N.Y.2d at 392–93, 361 N.E.2d at 995, 393 N.Y.S.2d at 345–46; then citing *Greenberg*, 290 A.D.2d at 413, 736 N.Y.S.2d at 74–75; and then citing Rigie v. Goldman, 148 A.D.2d 23, 26, 543 N.Y.S.2d 983, 984 (1989)) ("A party in a negligence case is permitted to introduce evidence of habit or routine 'to allow the inference of its persistence . . . .'").

241. 166 A.D.3d 1516, 1516, 87 N.Y.S.3d 770, 771 (4th Dep't 2018).

242. *Id.*

243. *Id.*

the habit evidence charge.[244] On the plaintiff's appeal from the judgment entered on the verdict finding no negligence on the part of defendant, the Fourth Department held the trial court did not err in its rulings.[245] In so ruling, the court concluded the maintenance staff's testimony was sufficient to establish that its practice regarding snow and ice removal showed a deliberate repetitive practice which the staff controlled, and that practice engaged in a sufficient number of instances as it was a daily practice.[246]

Is the habit evidence rule applicable in criminal cases when the defendant seeks to invoke it? The Appellate Division, Second Department, in *People v. Megnath* answered that question in the affirmative, but the defendant's proof was insufficient to establish a habit.[247] In this murder prosecution, the defendant contended he could not have committed the murder because he was at home when the murder occurred.[248] In support, he called a witness who would testify that the defendant generally put out his garbage in front of his home in Brooklyn at 8:30 a.m. and thus could not have committed the murder which occurred at about 8:00 a.m. in Queens, but the trial court precluded that testimony.[249] The Second Department held the preclusion ruling was correct as the testimony was insufficient "to establish such a repetitive pattern as to be predictive of the defendant's conduct."[250] The court, with this rationale, was clearly indicating that proof a person would "generally," as contrasted to "always" except on limited occasions, as in *Ortega*, and "daily" as in *Rozier*, will not establish a habit.[251]

244. *Id.*

245. *Id*. at 1516–17, 87 N.Y.S.3d at 771–72 (citing Rew v. Beilein, 151 A.D.3d 1735, 1737–38, 57 N.Y.S.3d 808, 810–11 (4th Dep't 2017)).

246. *Rozier*, 166 A.D.3d 1516, 1516–17, 87 N.Y.S.3d 770, 771–72 (citing Mancuso v. Koch, 74 A.D.3d 1736, 1738, 904 N.Y.S.2d 832, 835 (4th Dep't 2010); and then citing Biesiada v. Suresh, 309 A.D.2d 1245, 1245, 746 N.Y.S.2d 739, 740 (4th Dep't 2003)).

247. 164 A.D.3d 834, 835, 79 N.Y.S.3d 557, 558 (2d Dep't 2018) (first citing People v. Simmons, 39 A.D.3d 235, 236, 833 N.Y.S.2d 437, 438 (1st Dep't 2007); and then citing RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 4-601 at 197 (11th ed. 1995)).

248. *See id.* at 835, 79 N.Y.S.3d at 558.

249. *Id.*

250. *Id*. (citing People v. Simmons, 39 A.D.3d 235, 236, 833 N.Y.S.2d 437, 438 (1st Dep't 2007); and then citing PRINCE, *supra* note 103, § 4-601 at 197–98).

251. *Id.*; Ortega v. Ting, 172 A.D.3d 1217, 1218, 102 N.Y.S.3d 110,113 (2d Dep't 2019) (first quoting Gucciardi v. New Chopsticks House, Inc., 133 A.D. 633, 634, 19 N.Y.S.3d 80,81 (2d Dep't 2015); then citing Simion v. Franklin Ctr. for Rehabilitation & Nursing, Inc., 157 A.D.3d 738, 739, 69 N.Y.S.3d 64, 65 (2d Dep't 2018); then citing Rojas v. Solis, 154 A.D.3d 985, 62 N.Y.S.3d 511, 512 (2d Dep't 2017); then citing Barchella v. Moser, 156 A.D.2d 324, 325–26, 548 N.Y.S.2d 522, 524 (2d Dep't 1989); and then citing Bullock v. Calbretta, 119 A.D.3d 884, 884–85, 989 N.Y.S.2d 862, 862–63 (2d Dep't 2014)); Rozier v. BTNH, Inc., 166 A.D.3d 1516, 87 N.Y.S.3d 770 (4th Dep't 2018).

B. Character Evidence

New York law provides that a defendant in a criminal action may offer evidence of character, in the form of reputation, testimony that is relevant to prove the defendant acted in conformity therewith on a particular occasion.[252] This criminal evidence rule was in issue in *People v. Durrant*.[253] The defendant was charged with sexual abuse of an eight-year-old child who was related to his girlfriend.[254] At the trial, the victim gave sworn testimony that the defendant had sexually abused her.[255] The defendant called as a character witness a co-worker from his prior employment, who testified that he was not aware that defendant had a bad reputation for sexually abusive or sexually inappropriate conduct in their "working community."[256] However, he was not permitted to respond to the question of whether he was aware of anyone ever saying "anything bad with respect to [the defendant] being sexually inappropriate or sexually abusive toward other people in the workplace."[257] The People then moved to strike the witness's testimony, which motion was granted on the ground that the witness was not aware of the defendant's reputation, and testimony that a witness never heard anyone say anything negative is not sufficient character evidence.[258]

The Second Department initially determined the trial court erred in rejecting the character witness's proposed testimony on the ground given because "negative evidence of reputation—*i.e.*, that the witness never heard anyone say anything negative about the defendant—can constitute relevant character evidence."[259] However, it concluded the testimony was nonetheless inadmissible because it was irrelevant since the defendant's reputation in the workplace for lack of sexual impropriety "was in no way

252. *See, e.g.*, People v. Miller, 35 N.Y.2d 65, 67–68, 315 N.E.2d 785, 786, 358 N.Y.S.2d 733, 735-36 (1974) (quoting People v. Trimarchi, 231 N.Y. 263, 266, 131 N.E. 910, 911 (1921)); People v. Van Gaasbach, 189 N.Y. 408, 413–14, 82 N.E. 718, 719–20 (1907) (quoting Edgington v. United States, 164 U.S. 361, 363 (1896)) (arguing a defendant may present reputation testimony as evidence of the defendant's character).

253. 173 A.D.3d 890, 891–92, 102 N.Y.S.3d 718, 720 (2d Dep't 2019).

254. *Id*. at 891, 102 N.Y.S.3d at 719.

255. *Id*.

256. *Id*. at 891, 102 N.Y.S.3d at 720.

257. *Id*.

258. *Durrant*, 173 A.D.3d at 891–92, 102 N.Y.S.3d at 720.

259. *Id*. (first citing People v. Bouton, 50 N.Y.2d 130, 140, 405 N.E.2d 699, 704, 428 N.Y.S.2d 218, 223 (1980); then citing People v. Van Gaasbeck, 189 N.Y. 408, 421, 82 N.E. 718, 722 (1907); then citing People v. Thompson, 75 A.D.2d 830, 427 N.Y.S.2d 464, 465 (2d Dep't 1980); and then citing People v. Malinowski, 42 A.D.2d 189, 191, 350 N.Y.S.2d 454, 456 (3d Dep't 1973)).

relevant to whether he sexually abused a child in secret and outside the workplace."[260]

C. Molineux

New York's *Molineux* rule, applicable in both civil and criminal actions, provides that evidence of crimes, wrongs or acts committed by a person, while inadmissible for the purpose of raising an inference that the person is likely to have committed the crime charged or the act in issue, may be admissible when such evidence is offered for a non-conformity purpose that is relevant in the action.[261] Relevant non-conformity purposes include impeachment of the person when the person testifies at a trial or the person's intent.[262]

The *Molineux* rule was in issue in *High Value Trading, LLC v. Shaoul*.[263] This fraud action involved claims by the plaintiff Alskon against the defendants Shaoul and Universe Antiques in connection with Shaoul's sale of a Renoir painting to plaintiff which was represented as a genuine Renoir but was later found to be a fake.[264] The trial court granted the plaintiff's *in limine* motion for leave to present evidence of Shaoul's conviction for conspiracy and mail fraud, and a judgment in a civil action in which Shaoul and Universe Antiques were found to have sold a fake Tiffany window to impeach Shaoul when he testifies at trial.[265] The defendants contended that plaintiff exceeded the limits of the *in limine* ruling by referring to the conviction and art fraud case in plaintiffs' counsel's opening statement.[266] The Appellate Division, First Department, held that the comments were proper because defense counsel had confirmed Shaoul would testify, and that in any event, the plaintiff's prior legal history was admissible under the *Molineux* rule to establish Shaoul's fraudulent intent in selling the Renoir.[267]

The First Department's decision is a good reminder to attorneys to consider whether convictions and the bad acts of a party, classic

260. *Id.*

261. *See* People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901).

262. PRINCE, *supra* note 103, §4-501 at 175–176, §6-406 at 389–390, §6-409 at 395–396.

263. 168 A.D.3d 641, 641–42, 93 N.Y.S.3d 306, 308 (1st Dep't 2019) (citing People v. Schwartzman, 24 N.Y.2d 241, 246, 247 N.E.2d 642, 645, 299 N.Y.S.2d 817, 822 (1969)).

264. *Id.* at 641, 93 N.Y.S.3d at 307.

265. *Id.* at 641, 93 N.Y.S.3d at 307–308 (first citing United States v. Shaoul, 41 F.3d 811, 812 (2d Cir. 1994); and then citing Universe Antiques, Inc. v. Vareika, 510 Fed. Appx. 74, 75 (2d Cir. 2013)).

266. *Id.* at 641–42, 93 N.Y.S.3d at 308.

267. *Id.* (citing *Schwartzman*, 24 N.Y.2d at 246, 247 N.E.2d at 645, 299 N.Y.S.2d at 822).

impeachment value, may also be used for substantive evidence in proving a party's claim or defense.[268]

IV. AUTHENTICATION

A. Digital Images

In recent years, attorneys are frequently making extensive use of Google Maps, Google Earth, Google Earth Pro and similar competing web-mapping services for obtaining visual information for specific locations involved in litigation, often for multiple dates.[269] The visual image may consist of a satellite image, map, geographic location distance or other information indicating the date it was obtained from the web-mapping service. The visual image created has led to the question of how does the attorney get the digital image admitted into evidence, which in essence means how does the attorney authenticate the digital image, thereby complying with the common law authentication requirement for non-testimonial proof?[270] The legislature addressed this question by enacting a statutory provision, effective December 28, 2018, CPLR 4532-b.[271] This new CPLR provision creates an authentication mechanism by creating a rebuttable presumption that a digital image taken from a web-mapping service is a fair and accurate depiction of "that which it is being offered to prove."[272] If the presumption is not rebutted, the court "shall take judicial notice and admit into evidence [the digital image]."[273]

B. Production of Material in Discovery

When documents, created or authored by a party, are provided by the party to an opposing party in response to that party's discovery demand, and the receiving party seeks to introduce into evidence those

268. *High Value Trading*, 168 A.D.3d at 642, 93 N.Y.S.3d at 308.

269. *See generally* Jeffrey Bellin and Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. L. REV. 1137 (2014) (discussing the increased use of internet resources such as Google Maps by attorneys for obtaining information used in litigation).

270. N.Y. EVID. GUIDE RULE 9.01(1).

271. N.Y. C.P.L.R. 4532-b (McKinney 2019). Of note, this statutory provision was initially enacted in 2018, effective December 28, 2018 as an amendment to N.Y. C.P.L.R. 4511 by Act of December 28, 2018, 2018 McKinney's Sess, Laws of N.Y., ch.3, § 1. Its provisions were incorporated into C.P.L.R. 4532-b as added by Act of August 30, 2019, 2019 McKinney's Sess. Laws of N.Y., ch. 223, § 1. While the provision was enacted in 2019, its effective date was designated as September 28, 2018. *Id.*

272. N.Y. C.P.L.R. 4532-b.

273. *Id.* This provision is more fully discussed in Michael J. Hutter, *Streamlining the Authentication Process: Two New CPLR Amendments*, N.Y.L.J. 3 (Feb. 7, 2019).

records, the common law authentication requirement comes into play.[274] To ease the authentication burden with respect to the produced documents, the Legislature enacted CPLR 4540-a.[275] This statutory enactment creates a presumption of authenticity for any "material" produced by a party in response to a demand made pursuant to CPLR article 31.[276] Thus, the provision will cover not only documents in written form but also digital records, tangible items and photographs.[277]

C. Surveillance Videotapes

Video recordings of accidents or crimes taken by a security camera at a location adjacent to or near an accident or crime scene are common today.[278] They, of course, can be highly relevant in an ensuing personal injury action or criminal prosecution. Complying with the common law authentication requirement for their admission was the subject of two instructive Appellate Division decisions.[279]

In *Torres v. Hickman*, the plaintiff alleged that the defendant's vehicle struck her vehicle in the rear, causing a limitation in the range of motion in her right shoulder and substantial pain.[280] At trial, the plaintiff testified the impact of the collision was "very hard," and her orthopedic surgeon opined about the extent of her shoulder injury as a result of that impact.[281] When the trial court precluded the surgeon from testifying that the accident imparted "tremendous energy" to the plaintiff's vehicle, the plaintiff moved to enter into evidence a thirty-second portion of a surveillance video recording of the accident, put on a disc, taken by a security camera located on the premises of a nearby business.[282] In seeking to lay a foundation to authenticate the video recording adduced the testimony of a "tech supervisor" employed by the business.[283] He testified that he installed and maintained the security camera, but that he did not record the original video, nor did he copy the relevant portion of

274. N.Y. EVID. GUIDE RULE 9.01(1).

275. N.Y. C.P.L.R 4540-a.

276. N.Y. C.P.L.R. art. 31.

277. *See* SIEGEL & CONNERS, *supra*, note 179, § 362, 678-81. For further discussion of CPLR 4540-a, *see* Hutter, *supra* note 273.

278. Robert S. Kelner & Gail S. Kelner, *Preservation and Spoliation of Audio and Video*, N.Y.L.J. 3 (July 22, 2014).

279. Torres v. Hickman, 162 A.D.3d 821, 822, 79 N.Y.S.3d 62, 64 (2d Dep't 2018); People v. Alston, 169 A.D.3d 1, 7, 92 N.Y.S.3d 18, 21 (1st Dep't 2019).

280. 162 A.D.3d at 821–22, 79 N.Y.S.3d at 63–64.

281. *Id.* at 822, 79 N.Y.S.3d at 64.

282. *Id.*

283. *Id.*

that view onto the disc.[284] He also testified he did not know how the master recording was edited to produce the thirty-second excerpt on the disc.[285] Notably, he did not testify that the excerpt was a true and accurate depiction of a portion of the master recording or that it depicted the entire recorded event in question.[286] He also lacked any firsthand knowledge of who prepared the subject disc or of how and when it was supplied to the plaintiff's attorney.[287] The trial court ruled the video recording could not be admitted as plaintiff's authentication proof was insufficient.[288] The jury returned a verdict in defendant's favor.[289]

The Appellate Division, Second Department, upheld the trial court's ruling.[290] Noting that the authentication requirement required proof that the video recording was a fair and accurate representation of the accident, the court held the plaintiff's proof was clearly insufficient as his foundation witness did not and could not testify to the accuracy of the video excerpt or the disc.[291] The court then commented on potential foundation alternatives where, as here, there is no videographer who could testify that the video recording depicted what he or she saw.[292] That alternative would be proof establishing the claim of custody of the video recording, from its creation to its placement on the disc, which would show that the video recording was reasonably tamper-proof.[293]

In *People v. Alston*, a criminal possession of a weapon and menacing prosecution, the trial court admitted a video recording of a restaurant's surveillance videotape made by a police officer on her cell phone.[294] To authenticate it, the People adduced the testimony of the restaurant manager who testified the video was a fair and accurate depiction of what

284. *Id.*

285. *Torres*, 162 A.D.3d at 822, 79 N.Y.S.3d at 64.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* (citing N.Y. INS. LAW § 5102(d) (McKinney 2019)).

290. *Torres*, 162 A.D.3d at 821, 79 N.Y.S.3d at 63.

291. *Id.* at 823, 79 N.Y.S.3d at 64–65 (citing Read v. Ellenville Nat'l Bank, 20 A.D.3d 408, 409–10, 799 N.Y.S.2d 78, 79 (2d Dep't 2005)).

292. *Id.* at 823, 79 N.Y.S.3d at 64 (first quoting People v. Byrnes, 33 N.Y.2d 343, 349, 308 N.E.2d 435, 438, 352 N.Y.S.2d 913, 917 (1974) (". . . truly and accurately represents what was before the camera."); then citing Zegarelli v. Hughes, 3 N.Y.3d 64, 69, 814 N.E.2d 795, 798; 781 N.Y.S.2d 488, 491 (2004)).

293. *Id.* (first quoting People v. Patterson, 93 N.Y.2d 80, 84, 710 N.E.2d 665, 668, 688 N.Y.S.2d 101, 104 (1999) ("Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering."); then citing *Read*, 20 A.D.3d at 409, 799 N.Y.S.2d at 79).

294. 169 A.D.3d 1, 1, 4, 92 N.Y.S.3d 18, 19, 20 (1st Dep't 2019).

he observed inside the restaurant on the night of the incident that involved the defendant.[295] The Appellate Division, First Department, held the restaurant manager's testimony was sufficient to satisfy the authentication requirement for the video, and that nothing more was required.[296] The basis for this holding was the manager's own testimony that he had personal knowledge of what was depicted in the video.[297] In this connection, it was thus not necessary for the People to call the police officer who made the video for the surveillance tape or demonstrate that the original surveillance tape had not been tampered with.[298]

V. WITNESSES

A. Dead Man's Statute

New York's so-called Dead Man's Statute provides in substance that a person or party interested in the event, or his or her predecessor in interest, is incompetent to testify to a personal transaction or communication with a deceased or lunatic, when such testimony is offered against the representative or successors in interest of the deceased or lunatic.[299] In *Wright v. Morning Star Ambulette Services, Inc*., the plaintiff's decedent underwent a surgical procedure at the defendant New York Methodist Hospital.[300] While the surgery went without incident, decedent became unresponsive and apneic when he was transferred from the operating table to a stretcher, and then went into cardiac arrest, and died.[301] The plaintiff sued the surgeon who performed the surgery and the Hospital, among others, alleging causes of action for medical malpractice, lack of informed consent, and wrongful death.[302] After the close of discovery, the surgeon moved for summary judgment, dismissing the complaint as alleged against him, submitting in support an affidavit from a medical expert.[303] The expert opined that decedent was aware of the risks of the surgery because he signed a consent form for a similar procedure two years earlier.[304] The supreme court held the surgeon's

295. *Id.* at 4–5, 92 N.Y.S.3d at 20–21 (citing *Patterson*, 93 N.Y.2d at 84, 710 N.E.2d at 668, 688 N.Y.S.2d at 104).

296. *Id.* at 5, 92 N.Y.S.3d at 20–21.

297. *Id.* at 5, 92 N.Y.S.3d at 21.

298. *Id*. at 5, 92 N.Y.S.3d at 20 (citing *Patterson*, 93 N.Y.2d at 84, 710 N.E.2d at 668, 688 N.Y.S.2d at 104).

299. N.Y. C.P.L.R. 4519 (McKinney 2019).

300. 170 A.D.3d 1249, 1249, 96 N.Y.S.3d 678, 680 (2d Dep't 2019).

301. *Id.*

302. *Id.*

303. *Id*. at 1249–50, 96 N.Y.S.3d at 680–81.

304. *Id*. at 1251, 96 N.Y.S.3d at 682.

reliance upon decedent's signed consent form violated CPLR 4519, rendering his affidavit procedurally deficient and denied the motion.[305] The Appellate Division, Second Department, reversed, and granted the motion.[306] In its view, CPLR 4519 did not preclude the expert from relying on decedent's executed consent form because that statutory provision does not bar the introduction of documentary evidence authored by the deceased against the deceased's estate where the document is authenticated by a source other than an interested witness's testimony.[307] Here, decedent's consent form was properly authenticated as it was contained in decedent's medical records, and those records were properly authenticated.[308]

B. Examination

Trial judges in New York are vested with discretion to control the examination of witnesses.[309] The exercise of that discretion with respect to the use of leading questions was addressed in two instructive decisions.[310]

In *People v. Graham*, the Appellate Division, Fourth Department, was asked to determine whether the trial court abused its discretion in permitting the prosecutor in the sexual abuse case to use leading

305. *Wright*, 170 A.D.3d at 1250, 96 N.Y.S.3d at 681.

306. *Id*. at 1253, 96 N.Y.S.3d at 683.

307. *Id*. at 1251, 96 N.Y.S.3d at 682 (first quoting Acevedo v. Audubon Mgmt., Inc., 280 A.D.2d 91, 95, 721 N.Y.S.2d 332, 335 (1st Dep't 2001) (". . . the introduction of documentary evidence against a deceased's estate. . . . [A]n adverse party's introduction of a document authored by a deceased does not violate the Dead Man's Statute, as long as the document is authenticated by a source other than an interested witness's testimony concerning a transaction or communication with the deceased."); then citing Miller v. Lu-Whitney, 61 A.D.3d 1043, 1045, 876 N.Y.S.2d 211, 213 (3d Dep't 2009); and then citing Yager Pontiac, Inc. v. Fred A. Danker & Sons, Inc., 41 A.D.2d 366, 368; 343 N.Y.S.2d 209, 211 (3d Dep't 1973) *aff'd* 34 N.Y.2d 707, 313 N.E.2d 340, 356 N.Y.S.2d 860 (1974)).

308. *Id*. at 1252, 96 N.Y.S.3d at 682 (citing People v. Ortega, 15 N.Y.3d 610, 617, 942 N.E.2d 210, 214, 917 N.Y.S.2d 1, 5 (2010); and then citing Butler v. Cayuga Med. Ctr., 158 A.D.3d 868, 873, 71 N.Y.S.3d 642, 647 (3d Dep't 2018)).

309. *See, e.g.*, Bernstein v. Bodean, 53 N.Y.2d 520, 529, 426 N.E.2d 741, 745, 443 N.Y.S2d 49, 53 (1981); N.Y. UNIFIED CT. SYS., GUIDE TO NEW YORK EVIDENCE RULE 6.11 n. 3 (2017), https://www.nycourts.gov/JUDGES/evidence/6-WITNESSES/ARTICLE%206%20RULES.pdf.

310. *See generally* People v. Graham, 171 A.D.3d 1566, 99 N.Y.S.3d 562 (4th Dep't 2019) (finding use of leading questions by a prosecutor during a sex abuse case was permissible for the purpose of developing the witness's testimony); In re Giaquinto, 164 A.D.3d 1527, 83 N.Y.S.3d 728 (3d Dep't 2018) (holding that lower court properly exercised its discretion in not allowing petitioner to be examined by the use of leading questions as petitioner was not reluctant or evasive in answering questions). New York courts have traditionally deemed a question to be leading when it suggests to the witness the answer the examining attorney wants. *See* People v. Mather, 4 Wend. 229, 247 (Sup. Ct. of Judicature 1830).

questions during the prosecutor's direct examination of the child victim and the People's expert.[311] While leading questions should not ordinarily be permitted on direct examination,[312] the court held that the trial court had discretion to permit their use even on direct examination when their use is reasonably necessary to develop the witness's testimony.[313] Here, where the witness was a child who had been sexually abused, examining her by the use of leading questions was clearly appropriate.[314] As to the expert, the brief use of leading questions was appropriate as they were only used on a preliminary or contested manner, obviously used to expedite the expert's testimony.[315]

In *Matter of Giaquinto*, the Appellate Division, Third Department, addressed the use of leading questions in a contested probate matter.[316] The petitioner as executor of the estate of the deceased moved to probate the will executed by the deceased and respondent challenged the validity of the will, claiming fraud, undue influence, and lack of testamentary capacity.[317] At the trial of this matter, the respondent called petitioner on her case, and sought to examine the petitioner using leading questions, which request was denied by the Surrogate's Court.[318] The Third Department initially noted that the mere status of the witness to be examined on direct as an adverse party does not entitle the examiner to question the witness using leading questions; instead, the trial court has discretion to permit the use of leading questions on direct examination of such a witness.[319] While such discretion may be exercised to permit the use of leading questions when the witness is an adverse party, it need not be exercised when the adverse party witness shows no sign of hostility.[320] Here, the Surrogate's Court properly exercised its discretion in not allowing petitioner to be examined by the use of leading questions as

311. 171 A.D.3d 1566, 1570, 98 N.Y.S.3d 562, 567 (4th Dep't 2019) (first citing People v. Boyd, 50 A.D.3d 1578, 1578, 855 N.Y.S.2d 789, 790 (4th Dep't 2008); and then citing People v. Greenhagen, 78 A.D.2d 964, 966, 433 N.Y.S.2d 683, 685–686 (4th Dep't 1908)).

312. PRINCE, *supra* note 103, § 6-223, 371–72.

313. *Graham*, 171 A.D.3d at 1570, 98 N.Y.S.3d at 567. This conclusion was expressed through the court's citation to a prior decision of the court, *Boyd*, 50 A.D.3d 1578, 1578, 855 N.Y.S.3d 789,790, *lv. den.* 11 N.Y.3d 785, 896 N.E.98, 866 N.Y.S.3d 612 (2018).

314. *Id.*

315. *Id.* (quoting People v. Martina, 48 A.D.3d 1271, 1272, 852 N.Y.S.2d 527, 529 (4th Dep't 2008).

316. 164 A.D.3d 1527, 83 N.Y.S.3d 728 (3d Dept. 2018), *affd.* 32 N.Y.3d 1180, 118 N.E.906, 94 N.Y.S.3d 244 (2019).

317. *Id.* at 1527, 83 N.Y.S.3d at 730.

318. *Id.* at 1530, 83 N.Y.S.3d at 732.

319. *Id.* at 1530–31, 83 N.Y.S.3d at 732–33 (quoting Ostrander v. Ostrander, 280 A.D.2d 793, 793, 720 N.Y.S.2d 635, 635–36 (3d Dep't 2001)).

320. *Id.* at 1531, 83 N.Y.S.3d at 733.

petitioner was not reluctant or evasive in answering questions, thus obviating any need to use leading questions.[321]

C. Refreshing Recollection

May a forgetful witness's recollection be refreshed by the use of a writing not prepared by the witness? The Appellate Division, Fourth Department, in *People v. Garrow* held such use was permissible under the refreshing recollection rule.[322] The issue arose on the retrial of defendant on the charge of rape in the first degree and predatory sexual assault of a child, the first trial having ended in a hung jury.[323] At the retrial, the victim testified that she told her mother that defendant "did something bad" to her, but she could not remember specifically what she told her mother that defendant did.[324] The trial court allowed the prosecutor to refresh the victim's recollection using a transcript from the mother's testimony at the retrial.[325] Her recollection having been refreshed, the victim then testified that she told her mother that defendant did it "with his penis."[326] The Fourth Department rejected defendant's argument that it was improper to use a writing, here the transcript, which was not made by the witness.[327] It held New York law permitted the use of any writing, whether or not made by the witness, to refresh a witness's recollection.[328] This holding is consistent with precedent from the Court of Appeals dating back to 1852, *Huff v. Bennett*, wherein the Court stated a witness "is permitted to assist his memory by the use of any written instrument, memorandum or entry in both, and it is not necessary that such writing should have been made by the witness himself."[329]

D. Opinion

New York law is well established that a trial court has discretion to permit a lay witness to give lay opinion that the defendant in the subject criminal prosecution was the person depicted in a photograph or a

321. *Id.*

322. 171 A.D.3d 1542, 1547, 99 N.Y.S.3d 827, 833 (4th Dep't 2019) (first citing People v. Betts, 272 A.D. 737, 741, 74 N.Y.S.2d 791, 794 (1st Dep't 1947); and then citing People v. Goldfeld, 60 A.D.2d 1, 11, 400 N.Y.S.2d 229, 235 (4th Dep't 1977)).

323. *Id.* at 1542, 99 N.Y.S.3d at 830. The child was four years old when the crime occurred. *Id.*

324. *Id.* at 1542–43, 99 N.Y.S.3d at 830.

325. *Id.* at 1547, 99 N.Y.S.3d at 833.

326. *Garrow*, 171 A.D.3d at 1547, 99 N.Y.S.3d at 833.

327. *Id.*

328. *Id.*

329. 6. N.Y. 337, 339 (1852). *See also* N.Y. UNIFIED COURT SYSTEM, GUIDE TO N.Y. EVID., RULE 6.09(1) (2018).

videotape when the opinion will "aid the jury in making an independent assessment regarding whether the [person] in the [photograph or videotape] was indeed the defendant…."[330] In three decisions, the Appellate Division, First Department, addressed the foundation necessary to satisfy this standard.[331]

In *People v. Rivera*, a robbery prosecution, two witnesses gave their lay opinion that defendant was the person depicted in photographs made from surveillance videotapes from areas in and around the building where the robbery occurred and at the shelter where defendant resided at the time of the robbery several months prior to the robbery.[332] In determining whether the opinions were properly admitted, the First Department initially noted that to satisfy the admissibility standard for such an opinion, there must be a factual basis for concluding that the witness was more likely to correctly identify the defendant from the photograph than is the jury.[333] The Court then found the foundation was sufficiently established by proof that the defendant's appearance had changed in several significant respects since the crime; the witnesses were sufficiently familiar with the defendant, and thus able to recognize the defendant's mannerisms and peculiar way of walking; and the photographs were of poor quality.[334] Of note, this proof was admitted at a full evidentiary hearing and came from the witness's detailed grand jury testimony.[335]

In *People v. Calderon*, a criminal possession of a weapon prosecution, the arresting police officer was permitted to give his lay opinion that defendant was one of the persons depicted in a surveillance videotape of the events that occurred immediately before the defends was arrested.[336] Applying the foundation standard it applied in *Rivera*, the

330. 79 N.Y.2d 1024, 1025, 594 N.E.2d 922, 923, 584 N.Y.S.2d 428 (1992).

331. *See generally* People v. Rivera, 170 A.D.3d 566, 96 N.Y.S.3d 553 (1st Dep't 2019) (finding that a foundation must be laid to establish a witness could more easily identify a person from a photograph than a jury and such foundation was met when a party could show that the person's appearance had changed since the crime, the witness was adequately familiar with the defendant to identify him and the photographs quality were not high.); People v. Calderon, 171 A.D.3d 422, 97 N.Y.S.3d 96 (1st Dep't 2019) (finding when an arresting officer was not familiar with the defendant, he could not be more likely to correctly identify him than the jury.); People v. McKinney, 171 A.D.3d 555, 98 N.Y.S.3d 196 (1st Dep't 2019) (finding that a police officer, when familiar with defendant, identified the defendant on video tape, this did not invalidate the grand jury proceedings.).

332. 170 A.D.3d 566, 567, 96 N.Y.S.553, 554 (1st Dep't 2019).

333. *Id.* at 567, 96 N.Y.S.3d at 554.

334. *Id.*

335. *Id.* The court also endorsed the trial court's decision to hold the hearing in order to determine the admissibility of the opinions. *Id.*

336. 171 A.D.3d 422, 422–23, 97 N.Y.S.3d 96, 98 (1st Dep't 2019).

court held the people had failed to provide an evidentiary basis from which it could be concluded that the officer was more likely to correctly identify the defendant from the videotape than was the jury.[337] In this regard, the court expressly noted the officer was not previously familiar with the defendant.[338] While the trial court erred in allowing the opinion to be given, the error was held to be harmless.[339]

People v. McKinney addressed the lay opinion issue in the context of an appeal by the people from the dismissal of the indictment.[340] The indictment was dismissed upon the trial courts determination that the grand jury testimony of a police officer who identified the defendant in videotapes presented to the grand jury.[341] The court reversed and reinstated the indictment, finding that the officer's testimony was permissible.[342] In support, the court noted the police officer, who had not witnessed the subject incidents, knew defendant from the area.[343] The opinion was permitted on this showing alone because the grand jurors did not have the means of making a comparison between the videotapes and defendant's appearance.[344]

E. Impeachment by Criminal Conviction

CPLR 4513 provides that a testifying witness who has been convicted of a crime is subject to examination about the prior conviction, which "may be proved for the purpose of affecting the weight of the witness's testimony, either by cross-examination, upon which he should be required to answer any relevant question, or by the record."[345] The Appellate Division departments have interpreted this provision to give litigants wide latitude to impeach the credibility of a witness who testifies in a civil trial with the witness's criminal conviction(s).[346]

337. *Id.* at 423, 97 N.Y.S.3d at 98.

338. *Id.*

339. *Id.*

340. 171 A.D.3d 555, 555, 98 N.Y.S.3d 196, 197 (1st Dep't 2019).

341. *Id.*

342. *Id.* at 556, 98 N.Y.S.3d 197.

343. *Id.*

344. *Id.* at 555–56, 98 N.Y.S.3d at 197.

345. N.Y. C.P.L.R. 4513 (McKinney 2019).

346. *See, e.g.*, Sansevere v. United Parcel Serv., Inc., 181 A.D.2d 521, 522–23, 581 N.Y.S.2d 315, 316 (1st Dep't 1992) ("A civil litigant is granted 'broad authority to use the criminal convictions of an adverse witness to impeach the credibility of that witness.'") (citation omitted); Vernon v. N.Y.C. Health & Hosp. Corp., 167 A.D.2d 252, 252, 561 N.Y.S.2d 751, 751 (1st Dep't 1990) ("Any of plaintiff's criminal convictions would have been admissible under CPLR 4513, which grants a civil litigant broad authority to use the criminal convictions of an adverse witness to impeach the credibility of that witness.").

The wide latitude given to litigants was confirmed in *High Value Trading, LLC v. Shaoul*.[347] In this fraud action brought against an art dealer, the plaintiff had purchased from the dealer a painting that the art dealer represented was a genuine Renoir, but was later found to be a fake.[348] The trial court granted the plaintiff's *in limine* motion for leave to present evidence of the art dealer's federal conviction for conspiracy and mail fraud.[349] The Appellate Division, First Department, had no hesitation in upholding the ruling as such conviction could be used for impeachment purposes, without commenting on any possible misuse by the jury of the conviction for proof of the alleged fraud.[350] Similarly, the Appellate Division, Second Department, in *Castillo v. MTA Bus Co*., a personal injury action in which the plaintiff, a bus passenger, alleged she sustained back injuries when she was thrown to the floor of the bus due to rapid acceleration of the bus, upheld the trial court's ruling allowing the bus driver to be cross-examined about her prior conviction for reckless driving.[351] The possible misuse of that conviction by the jury in making its negligence finding was no bar to the affirmance as there was no mention of that possibility in the court's decision.[352]

On the other hand, in *Ubiles v. Halliwell-Kemp,* the Appellate Division, Fourth Department, held that a trial court, notwithstanding the wide latitude given in allowing criminal convictions to be used for impeachment purposes, may preclude such use in the exercise of its discretion.[353] The plaintiff in this slip and fall action had been convicted

347. *See generally* 168 A.D.3d 641, 93 N.Y.S.3d 306 (1st Dep't 2019) (upholding use of conviction evidence without comment on potential jury misuse of that evidence.).

348. *Id*. at 641, 93 N.Y.S.3d at 307.

349. *Id*. at 641, 93 N.Y.S.3d at 307–08 (citing United States v. Shaoul, 41 F.3d 811, 814 (2d Cir. 1994)).

350. *Id.* at 641, 93 N.Y.S.3d at 308 (first citing Mazella v. Beals, 27 N.Y.3d 694, 708, 57 N.E.3d 1083, 1092, 37 N.Y.S.3d 46, 55 (2016); and then citing Lipson v. Bradford Dyeing Assn. of U.S.A., 266 A.D. 595, 598, 42 N.Y.S.2d 577, 580 (1st Dep't 1943)).

351. Castillo v. MTA Bus Co., 163 A.D.3d 620, 621, 623, 80 N.Y.S.3d 426, 427, 428 (2d Dep't 2018) (first citing N.Y. C.P.L.R. 4513 (McKinney 2019); then citing Delva v. N.Y.C. Transit Auth., 123 A.D.3d 653, 654, 998 N.Y.S.2d 208, 210 (2d Dep't 2014); and then citing Scotto v. Daddario, 235 A.D.2d 470, 470, 652 N.Y.S.2d 311, 311 (2d Dep't 1997)).

352. *Id.*

353. Ubilies v. Halliwell-Kemp, 167 A.D.3d 1511, 1511–12, 89 N.Y.S.3d 813, 814 (4th Dep't 2018) (first citing Tornatore v. Cohen, 162 A.D.3d 1503, 1504, 78 N.Y.S.3d 542, 544 (4th Dep't 2006); then citing N.Y. C.P.L.R. 4513; then citing Morgan v. Nat'l City Bank, 32 A.D.3d 1264, 1265, 822 N.Y.S.2d 201, 203 (4th Dep't 2006); then citing Bodensteiner v. Vannais, 167 A.D.2d 954, 954, 561 N.Y.S.2d 1017, 1018 (4th Dep't 1990); then citing Siemucha v. Garrison, 111 A.D.3d 1398, 1399–1400, 975 N.Y.S.2d 518, 522 (4th Dep't 2013); and then citing Sansevere v. United Parcel Serv., 181 A.D.2d 521, 522–23, 581 N.Y.S.2d 315, 316–17 (1st Dep't 1992)).

of a drug crime fifteen years earlier.[354] The trial court precluded defendant from impeaching the plaintiff with evidence of this conviction.[355] The Fourth Department upheld the ruling, noting a trial court retains discretion to preclude impeachment by a criminal conviction.[356] Further, the exercise of that discretion in the action was proper in view of the age of the conviction and apparent subsequent clean record, which factors undermined any adverse credibility impact.[357] It would also appear that in conjunction with those factors the possible prejudice to plaintiff by reason of the nature of the crime, i.e., unlawful drug involvement, was another factor which lead to the preclusion of the use of the conviction.[358]

VI. HEARSAY

A. Admission

The Appellate Division, First Department, in *Nava-Juanez v. Mosholu Fieldston Realty, LLC*, addressed the admissibility of statement allegedly made by the plaintiff which, if admitted, would preclude summary judgment in favor of plaintiff, and a possible adverse verdict at trial.[359] Its decision is instructive regarding the application of the admissibility exception to the hearsay rule when the person who allegedly made the statement denies making it in the context of a writing submitted on behalf of the person and with the assistance of an interpreter.[360]

The plaintiff alleged he was injured when he fell from a ladder while painting a sign on the exterior of premises owned by the defendant.[361] At the close of discovery, the plaintiff moved for partial summary judgment on liability on his Labor Law Section 240(1) claim,[362] which motion was supported by his affidavit that he fell when the ladder he was working on shifted suddenly, and the affidavit of a co-worker who witnessed the accident and averred that plaintiff fell from the ladder he was working on

354. *Id*. at 1512, 89 N.Y.S.3d at 814 (first citing *Siemucha*, 111 A.D.3d at 1399–1400, 975 N.Y.S.2d at 522; and then citing *Sansevere*, 181 A.D.2d at 522–23, 581 N.Y.S.2d at 316–17).

355. *Id.*

356. *Id.*

357. *Id.*

358. *Ubilies*, 167 A.D.3d at 1512, 89 N.Y.S.3d at 814.

359. 167 A.D.3d 511, 512, 91 N.Y.S.3d 373, 374 (1st Dep't 2018).

360. *Id.* at 512, 91 N.Y.S.3d at 375.

361. *Id.* at 512, 91 N.Y.S.3d at 374.

362. N.Y. LAB. LAW § 240(1) (McKinney 2019).

when it shifted.[363] To raise a question of fact as to how the plaintiff was injured, defendant submitted in opposition to the plaintiff's motion the Worker's Compensation C-3 report filed on behalf of the plaintiff which contained the statement "while walking I fell down stairs."[364] The supreme court denied the motion, concluding an issue of fact was present as to whether plaintiff fell from a ladder, but the First Department reversed and granted the motion.[365]

The court's reversal was based on its conclusion that the statement was not admissible as an admission of the plaintiff.[366] The basis for this conclusion was New York law requires for a statement of a party to be admitted against the party under the admissions exception to the hearsay rule proof that the person who allegedly made the statement in fact made it.[367] The second reason given by the court actually overlapped with the first.[368] In that regard, the C-3 was prepared with the aid of an interpreter and plaintiff averred that he told the translator "Mientras estaba trabajando me cai de una escalera," asserting that the statement should have been translated as "While working I fell off a ladder."[369] The court noted that the Spanish word "escalera" may be translated as either "stairs" or "ladder" and there were no "stairs" to speak of as the premises involved was a one-story building and did not have an exterior staircase.[370] Significantly, the court noted the plaintiff was incapable of discovering the error in the translation of the description of his accident because he could not read English and correct the statement.[371]

B. Excited Utterance

In *People v. Cummings*, the Court of Appeals addressed New York's excited utterance exception to the hearsay rule.[372] This exception encompasses a statement about a startling or exciting event made by a person while under the stress of excitement caused by the event.[373] When

363. *Nava-Juarez*, 167 A.D.3d at 512, 91 N.Y.S.3d at 374. This proof, if uncontradicted, would be sufficient to establish as a matter of law defendant's liability. *See* Klein v. City of New York, 89 N.Y.2d 833, 835, 675 N.E.2d 458, 459, 652 N.Y.S.2d 723, 724 (1996).

364. *Nava-Juarez*, 167 A.D.3d at 512, 91 N.Y.S.3d at 374.

365. *Id.* at 511–12, 91 N.Y.S.3d at 374.

366. *Id.* at 512, 91 N.Y.S.3d at 375.

367. N.Y. EVID. GUIDE RULE 8.03.

368. *Nava-Juarez*, 167 A.D.3d at 512, 91 N.Y.S.3d at 375.

369. *Id.*

370. *Id.* at 513, 91 N.Y.S.3d at 374.

371. *Id.* at 513, 91 N.Y.S.3d at 375.

372. 31 N.Y.3d 204, 206, 99 N.E.3d 877, 879, 75 N.Y.S.3d 484, 486 (2018).

373. People v. Johnson, 1 N.Y.3d 302, 306, 804 N.E.2d 402, 405, 772 N.Y.S.2d 238, 241 (2003); N.Y. EVID. GUIDE RULE 8.17.

the person making the statement is not a participant in the event, but a bystander to it, the Court has instructed that foundation proof from which it is "inferable that the [person] had an opportunity to *observe personally* the event described in the [spontaneous] declaration" is required.[374] At issue in *Cummings* was whether that foundation element was established so as to allow the statement to be admitted as an excited utterance.[375]

The defendant was charged with multiple counts of attempted murder, assault, and criminal possession of a weapon.[376] These charges arose from a shooting that occurred on a street corner in Manhattan when a man wearing a hoodie and with his face obscured got out of a minivan and shot three men who were standing together at the street corner.[377] Shortly after the shooting, one of the men called 911, seeking medical assistance.[378] During the call, someone in the background could be heard saying "Yo, it was Twanek, man! It was Twanek, man!"[379] At the retrial of the charges, the first trial having ended in a hung jury, the trial court admitted the Twanek statement as an excited utterance.[380] The defendant was acquitted of the murder charges, but convicted of several of the other charges.[381]

The Court of Appeals ruled the statement was not admissible as an excited utterance.[382] While the essential elements for admission of the statement as an excited utterance seemed to be present, e.g., the statement was made under the stress of excitement caused by an exciting event,[383] the Court held that the People failed to establish that the person personally observed the accident, and was not merely passing on what someone told him.[384] In so holding, the Court rejected the People's argument that the

374. People v. Fratello, 92 N.Y.2d 565, 571, 706 N.E.2d 1173, 1176, 684 N.Y.S.2d 149, 152 (1998).

375. *Cummings*, 31 N.Y.3d at 207–08, 99 N.E.3d at 880, 75 N.Y.S.3d at 487.

376. *Id.* at 207, 99 N.E.3d at 880, 75 N.Y.S.3d at 487.

377. *Id.* at 206, 99 N.E.3d at 880, 75 N.Y.S.3d at 486. The defendant's first name was Twanek. *Id.*

378. *Id.*

379. *Cummings*, 31 N.Y.3d at 207, 99 N.E.3d at 879, 75 N.Y.S.3d at 486.

380. *Id.* at 207, 99 N.E.3d at 880, 75 N.Y.S.3d at 487. The circumstances surrounding the admission of the statement at trial is discussed supra, footnotes 38–49 and accompanying text.

381. *Id.*

382. *Id.* at 212, 99 N.E.3d at 883, 75 N.Y.S.3d at 490. The Court of Appeals specifically noted that the lack of identification of the person who made the statement did not per se preclude admission of the statement as an excited utterance. *Id.*

383. *Cummings*, 31 N.Y.3d at 213–14, 99 N.E.3d at 884, 75 N.Y.S.3d at 491 (Rivera, J., concurring) (citing People v. Nieves, 67 N.Y.2d 125, 135, 492 N.E.2d 109, 115, 505 N.Y.S.2d 1, 7 (1986)).

384. *Id.* at 211–12, 99 N.E.3d at 883, 75 N.Y.S.3d at 490 (citing Miller v. Keating, 754 F.2d 507, 511 (3d Cir. 1985)).

person "had to have been either at the corner or extremely nearby when the shooting occurred," as the 911 call was so close in time to the shooting.[385] The basis for the rejection was that since there were numerous people around the corner after the shooting, there was "no way to know whether the statement was made by someone who could see the assailant (who was wearing a hoodie, was not identifiable from [surveillance] videos, and was not identified by the victims)."[386]

A significant takeaway from *Cummings* is that parties who seek to admit a hearsay statement as an excited utterance, in civil or criminal actions, must be prepared to submit proof from which it is reasonably inferable that the person making the statement had personal knowledge of the event referenced in the statement.[387] In this connection the Court has clearly instructed the trial courts to carefully scrutinize that proof to ensure that it shows the person personally observed the event.[388] Only then, the Court has recognized, can the reliability of the person's statement be reasonably assured.[389]

Of note, Judge Rivera in a concurring opinion, not joined in by any of the other judges, raised a separate issue, whether the excited utterance exception should be abandoned due to recent commentary which suggest that statements admitted under the exception may not be reliable.[390] However, since this issue was not raised by the parties, Judge Rivera did not pursue it.[391]

C. Past Recollection Recorded

Under New York's past recollection recorded exception to the hearsay rule, when a witness at trial testifies that he or she cannot recall information about which he or she observed, a memorandum made or adopted by the witness setting forth that information may be admissible

385. *Id.* at 211, 99 N.E.3d at 883, 75 N.Y.S.3d at 490.

386. *Id.*

387. *See id.* at 206, 99 N.E.3d at 879, 75 N.Y.S.3d at 486.

388. *See Cummings*, 31 N.Y.3d at 206, 99 N.E.3d at 879, 75 N.Y.S.3d at 486.

389. *See id.*

390. *Id.* at 214–16, 99 N.E.3d at 885–86, 75 N.Y.S.3d at 492–93 (Rivera, J., concurring) (first citing Lust v. Sealy, 383 F.3d 580, 588 (7th Cir. 2004), then citing United States v. Boyce, 742 F.3d 792, 801–02 (7th Cir. 2017) (Posner, J., concurring), then citing Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 SEATTLE U. L. REV. 111, 114 (2017), and then citing Melissa Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies*, 26 STAN. L. & POL'Y REV. 269, 304 (2015)).

391. *Id.* at 216, 99 N.E.3d at 886, 75 N.Y.S.3d 493. It should be noted that there is commentary which rejects Judge Rivera's questioning of the continuing vitality of the excited utterances exception. *See* Mara D. Afzali, *Letting Sleeping Dogmas Lie: A Response to Judge Posner's Call to reform the res Gestae Exceptions to the Rule Against Hearsay*, 80 ALBANY L. REV. 595, 596 (2016/2017).

as a supplement to the witness's testimony.[392] In *People v. Tapia*, the Court of Appeals considered whether the exception encompassed a trial witness's grand jury testimony.[393]

The defendant was charged with several counts of assault, charges which arose out of a fight.[394] At trial, Sergeant Bello testified that when he was driving back to his precinct with Lieutenant Cosgrove, he saw defendant "body slam" the victim to the street outside a bar.[395] The officers exited their patrol car, Cosgrove pulled defendant off the victim.[396] When they were separated, Bello noticed the plaintiff was bleeding from his neck and face.[397] The defendant and another man were then arrested.[398]

During the trial, defense counsel informed the trial court that defendant would be requesting a missing witness charge if Cosgrove was not called as a witness.[399] When the People called Cosgrove, but Cosgrove could not recall the circumstances leading to defendant's arrest, the People sought to admit Cosgrove's grand jury testimony.[400] Cosgrove testified that he had appeared before the grand jury a few days after defendant's arrest, a time when the arrest and the surrounding events were fresh in his mind, that he testified truthfully and accurately before the grand jury, and his review of a transcript of that testimony did not refresh his recollection.[401] The grand jury testimony was brief and lacked details, but was consistent with Bello's testimony.[402] The defendant was convicted of the attempted assault charge, but acquitted of the assault charge.[403]

The Court of Appeals affirmed the defendant's conviction in a four to three decision.[404] The majority in an opinion authored by Chief Judge Janet DiFiore held the People had laid an adequate foundation for

392. People v. Taylor, 80 N.Y.2d 1, 8, 598 N.E.2d 693, 696, 586 N.Y.S.2d 545, 548 (1992) (citing Russell v. Hudson River R.R. Co., 17 N.Y. 134 (1858) (holding past recollection recorded may be admissible)).

393. 33 N.Y.3d 257, 260, 124 N.E.3d 210, 212, 100 N.Y.S.3d 660, 662 (2019).

394. *Id*. at 263, 124 N.E.3d at 214, 100 N.Y.S.3d at 664.

395. *Id*. at 260, 124 N.E.3d at 212, 100 N.Y.S.3d at 662.

396. *Id*. at 260, 124 N.E.3d at 212–13, 100 N.Y.S.3d at 662–63.

397. *Id*. at 260, 124 N.E.3d at 213, 100 N.Y.S.3d at 663.

398. *Tapia*, 33 N.Y.3d at 260, 124 N.E.3d at 213, 100 N.Y.S.3d at 663.

399. *Id.* at 261, 124 N.E.3d at 213, 100 N.Y.S.3d at 663.

400. *Id*.

401. *Id*. at 262, 124 N.E.3d at 213–14, 100 N.Y.S.3d at 663–64.

402. *Id*. at 262, 124 N.E.3d at 213–14, 100 N.Y.S.3d at 664.

403. *Tapia*, 33 N.Y.3d at 263, 124 N.E.3d at 215, 100 N.Y.S.3d at 665.

404. *Id.* (citing People v. Tapia, 151 A.D.3d 437, 439, 56 N.Y.S.3d 78, 82 (1st Dep't 2017)).

admission of the grand jury testimony under the past recollection recorded exception through Cosgrove's testimony.[405] His testimony established all of the elements necessary to invoke that exception, which are: the witness must have observed the matter recorded; the recollection must have been fairly fresh at the time when it was recorded; the witness must currently be able to testify that the record is a correct representation of his or her knowledge and recollection the time it was made, and the witness must lack sufficient present recollection of the information recorded.[406] In so holding, the Court recognized that there is no reason why grand jury testimony could not be admitted as a past recollection recorded.[407]

The majority rejected two further arguments made by defendant.[408] First, it held that the admission of the grand jury testimony under the exception was not barred by Criminal Procedure Law (CPL) 670.10.[409] That statutory provision was not applicable because Cosgrove testified and was cross-examined by defense counsel.[410] The Court also rejected defendant's argument that his Sixth Amendment right of confrontation was violated by the admission of the testimony.[411] There was no violation because Cosgrove testified at trial.[412] The fact that he could not remember much did not give rise to a violation as the right of confrontation, as held by the United States Supreme Court, "guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[413]

Judge Rawan Wilson authored a lengthy dissenting opinion, joined in by Judge Jenny Rivera, and Judge Eugene Fahey.[414] In their view, the admission of Cosgrove's grand jury testimony violated CPL 670.10 and

405. *Id.* at 264, 124 N.E.3d at 215, 100 N.Y.S.2d at 665.

406. *Id.*; *see* People v. Taylor, 80 N.Y.2d 1, 8, 598 N.E.2d 693, 696, 586 N.Y.S.2d 545, 548 (1992).

407. *Tapia*, 33 N.Y.3d at 268–69, 124 N.E.3d at 219, 100 N.Y.S.3d at 668; s*ee also* People v. Folk, 170 A.D.3d 403, 403, 103 N.Y.S.3d 38, 39 (1st Dep't 2019) (citing *Tapia* and holding that the grand jury testimony of a witness was erroneously admitted because the witness did not testify at trial that the grand jury testimony "correctly represented his knowledge and recollection when made").

408. *Tapia*, 33 N.Y.3d at 265, 124 N.E.3d at 216, 100 N.Y.S. 3d at 666.

409. *Id.* at 268, 124 N.E.3d at 218, 100 N.Y.S.3d at 668; *see* N.Y. CRIM. PROC. LAW § 670.10 (McKinney 2019).

410. *Tapia*, 33 N.Y.3d 265–69, 124 N.E.3d at 216–18, 100 N.Y.S.3d at 669–70.

411. *Id.* at 269, 124 N.E.3d at 219, 100 N.Y.S.3d at 669.

412. *Id.* at 270, 124 N.E.3d at 219–20, 100 N.Y.S.3d at 667–70.

413. *Id.* at 269, 124 N.E.3d at 219, 100 N.Y.S.3d at 669 (citing United States v. Owens, 484 U.S. 554, 559 (1988)); *see* CRIM. PROC. § 60.25.

414. *Tapia*, 33 N.Y.3d at 285, 124 N.E.3d at 230, 100 N.Y.S.3d at 680 (Wilson, J., dissenting).

defendant's right of confrontation.[415] As for the confrontation violation argument, the dissenters observed that since the trial of Aaron Burr in 1807, it had been the rule that the admission of such testimony violates the Confrontation Clause due to the lack of effective cross-examination.[416]

D. Business Records

Numerous decisions were issued in the *Survey* year which discussed whether a party in the litigation before the courts had established the requisite foundation to support the admissibility of a record or documents under New York's business records exception to the hearsay rule as set forth in CPLR 4518(a).[417] Of those decisions one merits discussion.[418] The Appellate Division, Second Department, decision in *Bank of New York Mellon v. Gordon* is notable because the court provided long-needed guidance for the admissibility of banking records in mortgage foreclosure actions.[419]

In *Mellon*, the plaintiff bank had commenced a mortgage foreclosure action against defendant.[420] The supreme court ruled the bank was entitled to summary judgment on its complaint, and with that ruling appointed a referee to calculate the amount due.[421] The Second Department reversed these rulings and denied the bank's motion.[422] The court held the bank had failed to establish the defendant's default under the loan documents based upon the court's further conclusion that the bank's supporting proof for its motion was in large part inadmissible under CPLR 4518(a).[423] Noting the dramatic increase in foreclosure litigation which revealed, among other things, poor record-keeping procedures, the court felt compelled to provide guidance to the bench and

415. *Id.* at 271, 124 N.E.3d at 221, 100 N.Y.S.3d at 670 (citing People v. Green, 78 N.Y.2d 1029, 581 N.E.2d 1330, 576 N.Y.S.2d 75 (1991)); *see* CRIM. PROC. § 670.10.

416. *Tapia*, 33 N.Y.3d at 270–71, 124 N.E.3d at 220, 100 N.Y.S.3d at 670 (Wilson, J., dissenting).

417. N.Y. C.P.L.R. 4518(a) (McKinney 2019).

418. *See generally* Bank of N.Y. Mellon v. Gordon, 171 A.D.3d 197, 97 N.Y.S.3d 286 (2d Dep't 2019) (discussing New York's business records exception to the rule against hearsay).

419. *Id.* at 199–200, 97 N.Y.S.3d at 289.

420. *Id.* at 200, 97 N.Y.S.3d at 289.

421. *Id.* at 200, 97 N.Y.S.3d at 290.

422. *Id.* at 212, 97 N.Y.S.3d at 298.

423. *Mellon*, 171 A.D.3d at 205, 209, 211, 97 N.Y.S.3d at 293, 296, 297 (first citing N.Y. C.P.L.R. 4518(a) (McKinney 2019); then citing Fulton Holding Grp., LLC v. Lindoff, 165 A.D.3d 1047, 1046, 87 N.Y.S.3d 66, 69 (2d Dep't 2018) (citations omitted); and then citing HSBC Mortg. Servs., Inc. v. Royal, 142 A.D.3d 952, 954, 37 N.Y.S.3d 321, 323 (2d Dep't 2016).

bar as to the prosecution of mortgage foreclosure actions.[424] In this comprehensive opinion authored by Justice Howard Miller, the court provided such guidance.[425]

After a lengthy discussion of the evidentiary standards on a summary judgment motion,[426] the court directed its attention to the main substantive issues in a foreclosure action, starting with the issue of standing.[427] Initially, recognizing that a plaintiff in a foreclosure action must prove its standing with evidence that the plaintiff is either the holder or assignee of the underlying note at the time the action is commenced, the court analyzed the bank's proof on that issue.[428] Here, the bank by its proof established that it was in physical possession of the original note endorsed in black since a date well before the commencement of its action.[429] This proof was submitted by the affidavit of an employee of its attorneys wherein she averred that she was the manager of a group of employees that were "responsible for receiving original loan documents from the firm's clients [and] documenting the receipt of [those] original loan documents"; that when a client forwards a file containing original loan documents "[her] staff makes a computer entry . . . confirming [their] receipt"; these entries were made "at or about the time of the receipt of the original loan documents"; the records of such events were "created and maintained in the ordinary course of [the] business" of the bank's attorneys; and that "[i]t was the normal course of [the firm's] business to store these records as computer entries."[430] Based on the fundamental premise that it is the business record itself, and not the foundational affidavit by which same is submitted, that serves as proof of the matter asserted, and thus the underlying records must be introduced before "evidence of the contents of the records is admissible," the court focused on whether the affidavit was sufficient to establish the requisite foundation.[431] The affidavit was sufficient because the employee set forth her familiarity with her employer's record-keeping procedures and practices and based on that familiarity set forth the basic foundation

424. *Id.* at 199–200, 97 N.Y.S.3d at 289.

425. *Id.* at 199, 97 N.Y.S.3d at 289.

426. *Id.* at 201–02, 97 N.Y.S.3d at 290–91.

427. *Id.* at 202, 97 N.Y.S.3d at 291.

428. *Mellon*, 171 A.D.3d at 203, 97 N.Y.S.3d at 292 (first quoting Wells Fargo Bank, N.A. v. Gallagher, 137 A.D.3d 898, 899, 28 N.Y.S.3d 84, 85 (2d Dep't 2016) (citations omitted); then citing Aurora Loan Servs., LLC v. Taylor, 25 N.Y.3d 355, 361, 34 N.E.3d 363, 365, 12 N.Y.S.3d 612, 614 (2015) (citations omitted)).

429. *Id.*

430. *Id.* at 206, 97 N.Y.S.3d at 294. These averments set forth the foundation elements for admission of the records under the exception. *Id.*

431. *Id.* at 207, 97 N.Y.S.3d at 295.

elements.[432] That familiarity was enough and it was not necessary that she also have familiarity with the practices and procedures of the original lender of any assignor.[433]

However, the court found the bank failed to lay a foundation for the records purporting to show defendant's default.[434] The bank had submitted an affidavit from an employee of the lender's loan service, who averred: "According to the business records I have reviewed, [defendant] defaulted on the loan by failing to make monthly payments due on May 1, 2008, and continuing to the present."[435] The record annexed to the affidavit was created by the original lender, but the affidavit did not indicate that the affiant was familiar with the original lender's record-keeping practices and procedures.[436] The absence of such proof doomed the bank because the foundation must be established by a person with knowledge of the practices and procedures of the business making the record.[437] The court then observed that it was not holding that the employee was incompetent to lay a foundation for the records created by another entity.[438] Rather, such records may be admitted "if the recipient can establish personal knowledge of the maker's business practices and procedures, or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business."[439]

While the court professed that it was providing "clarity" to the evidentiary requirements necessary to prosecute successfully a mortgage foreclosure action by the holder of the underlying note, it was in effect

432. *Mellon*, 171 A.D.3d at 207, 97 N.Y.S.3d at 295 (first citing N.Y. C.P.L.R. 4518(a) (McKinney 2019); then citing People v. Kennedy, 68 N.Y.2d, 579–80, 503 N.E.2d 501, 507–08, 510 N.Y.S.2d 853, 859–60 (1986); then citing Aurora Loan Servs., LCC v. Baritz 144 A.D.3d 618, 620, 41 N.Y.S.3d 55, 58 (2d Dep't 2016); then citing U.S. Bank N.A. v. Handler, 140 A.D.3d 948, 949, 34 N.Y.S.3d 463, 465 (2d Dep't 2016); and then citing Aurora Loan Services, LLC v. Mercius, 138 A.D.3d 650, 652, 29 N.Y.S.3d 462, 464 (2d Dep't 2016)).

433. *Id.*

434. *Id.* at 208, 97 N.Y.S.3d at 296.

435. *Id.*

436. *Id.*

437. *Mellon*, 171 A.D.3d at 208, 97 N.Y.S.3d at 296 (quoting Citibank, N.A. v. Cabrera, 130 A.D.3d 861, 861, 14 N.Y.S.3d 420, 421 (2d Dep't 2015)).

438. *Id.* at 209, 97 N.Y.S.3d at 296 (citing People v Crastley, 86 N.Y.2d 81, 90, 653 N.E.2d 1162, 1167, 629 N.Y.S.2d 992, 997 (1995)).

439. *Id.* at 208, 97 N.Y.S.3d at 296 (first citing *Crastley*, 86 N.Y.2d at 90–91, 653 N.E.2d at 1167, 629 N.Y.S.2d at 997; then citing State v. 158th St. & Riverside Drive Hous. Co., 100 A.D.3d 1293, 1296, 956 N.Y.S.2d 196, 200 (3d Dep't 2012); then citing People v. DiSalvo, 284 A.D.2d 547, 548–49, 727 N.Y.S.2d 146, 147 (2d Dep't 2001); then citing Plymouth Roch Fuel Corp. v. Leucadia, Inc., 117 A.D.2d 727, 728, 498 N.Y.S.2d 453, 454 (2d Dep't 1986); then citing United States v. Jakobetz, 955 F.2d 786, 801 (2d Cir. 1992); and then citing In re Ollag Constr. Equip. Corp., 665 F.2d 43, 46 (2d Cir. 1991)).

emphasizing that the foundation witness for the admission of records of that business under the exception must have sufficient personal knowledge about their creation and maintenance.[440]

E. Declarations Against Interest

New York has long recognized a "declaration against interest" hearsay exception for certain statements that are disserving to the declarant at the time it was made, provided the declarant is unavailable as a witness.[441] The application of this exception was in issue in *Caminiti v. Extell West 57th Street LLC*.[442]

This case arose out of an incident that occurred on a construction site involving the plaintiff's decedent.[443] He was working as an electrician and his job involved performing work while standing on a ladder.[444] At some point the decedent sustained injuries at the job site, and subsequently passed away.[445] The plaintiff commenced an action against the defendant, alleging among other claims, a Labor Law Section 240(1) claim predicated upon the decedent's being struck by the ladder he was working on when it moved and he tried to stabilize it.[446] The defendant, on the other hand, argued that the decedent's injuries and death were unrelated to any accident involving the ladder he had been working on.[447]

To defeat the defendant's motion for summary judgment and obtain partial summary judgment liability on her Labor Law Section 240(1) claim, the plaintiff submitted her deposition testimony about a statement made to her by the decedent, her husband, to establish an unsecured ladder caused the decedent's injuries.[448] The statement was made to her when he was with her in an emergency room awaiting surgery and, in that statement, he told her he was injured when he was struck by the ladder

440. *Id.* at 209, 97 N.Y.S.3d at 296 (quoting *Citibank, N.A.*, 130 A.D.3d at 861, 14 N.Y.S.3d at 421).

441. *See* People v. Brown, 26 N.Y.2d 88, 91, 257 N.E.2d 16, 17, 308 N.Y.S.2d 825, 827 (1970) (quoting JEROME PRINCE, RICHARDSON ON EVIDENCE § 241 (9th ed. 1964)).

442. *See generally* 166 A.D.3d 440, 88 N.Y.S.3d 13 (1st Dep't 2018) (the issue on appeal was the lower court's use of the declaration against interest exception to hearsay).

443. Caminiti v. Extell W. 57th St. LLC, No. 150298/2013, 2018 N.Y. Slip Op. 31583(U), at 1 (Sup. Ct. N.Y. Cty. 2018), *aff'd in part and modified in part*, 166 A.D.3d 440, 88 N.Y.S.3d 13 (1st Dep't 2018).

444. *Id.*

445. *Id.* at 1–2.

446. *Id.* at 2.

447. *Id.*

448. *Caminiti*, 2018 N.Y. Slip Op. 31583(U), at 2–3.

he was working on, as alleged in the complaint, and that he should have known better than to use the ladder as he did.[449]

On the defendant's appeal from the denial of its motion by the supreme court, the Appellate Division, First Department affirmed.[450] In its view, the decedent's statement to the plaintiff was admissible as a declaration against interest.[451] In so ruling, the court noted the statement was made by the decedent upon his personal knowledge as to what happened, the statement was against his interest when made, and that at the time of its making, the decedent was aware that the statement was against his interest.[452] In support of this conclusion, the statement was certainly against his interest, i.e., "he should have known better," because it indicated some fault on his part, and thus could be viewed as against his pecuniary or proprietary interest since such fault could adversely affect his ability to recover damages in a lawsuit.[453] Furthermore, it was readily apparent the decedent knew it was against his interest when made.[454]

While the exception was properly found to be applicable as its requisite elements were established, it should also be noted that the court, in support of its holding, expressly found the statement had "sufficient indicia of reliability" and that there was an "absence of any coercion or attempt to shift blame away from [plaintiff]."[455] In seeking to invoke the exception in the future, attorneys should make similar arguments to support its invocation.

VII. EXPERT TESTIMONY

A. Qualifications

New York courts follow the rule that before a witness can give expert opinion and testimony, the witness must be "possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered

449. *Id.*

450. *Caminiti*, 166 A.D.3d at 440, 88 N.Y.S.3d at 14–15.

451. *Id*. at 440, 88 N.Y.S.3d at 15 (first citing Basile v. Huntington Util. Fuel Corp., 60 A.D.2d 616, 617, 400 N.Y.S.2d 150, 151 (2d Dep't 1977), and then citing GUIDE TO N.Y. EVID. RULE 8.11, http://www.nycourts.gov/judges/evidence/8-HEARSAY/8.11_DECLARATION%20v.%20INTEREST.pdf).

452. *See id.*

453. *See id*.

454. *Id.* (citing Nucci v. Proper, 95 N.Y.2d 597, 602, 744 N.E.2d 128, 131, 721 N.Y.S.2d 593, 596 (2001)).

455. *Caminiti*, 166 A.D.3d at 440, 88 N.Y.S.3d at 15 (alteration in original) (citing *Nucci*, 95 N.Y.2d at 602, 744 N.E.2d at 131, 721 N.Y.S.2d at 596).

is reliable."[456] Whether the witness had the requisite qualifications to give the proffered expert opinion and testimony was in issue in three Appellate Division, Third Department, decisions, all of which involve thoughtful application of the expert qualifications standard to the witnesses involved.

In *People v. Pascuzzi*, the defendant was convicted of aggravated vehicular homicide and manslaughter.[457] The criminal prosecution was based on a charge that the defendant drove while highly intoxicated at an extremely high speed on an interstate highway and caused the deaths of his two passengers.[458] The defendant contended he was not driving the vehicle at the time of the accident.[459] To establish that the defendant was the driver, the People adduced proof that included the testimony of a physician, specializing in forensic pathology and neuropathy, who opined that both victims were passengers,[460] and a state police investigator, a member of the state police's collision reconstruction unit, who opined that the defendant was driving at the time of the crash.[461]

The physician testified that one of the victims had, in his opinion, been in the backseat on the passenger side at the time of the crash, based upon the nature and location of her injuries and the damage to the vehicle;[462] and the other victim had been seated in the front passenger seat at the time of the crash, an opinion also based on the nature of the victim's injuries.[463] The Third Department held that both opinions were properly admitted, rejecting defendant's argument that the physician was not qualified to give them.[464] It noted the physician's opinion was based upon the physical evidence of the victims' injures and the vehicle's damages, and was fully within the physician's professional expertise regarding the mechanism of the victims' injuries and the cause of their

456. Matott v. Ward, 48 N.Y.2d 455, 459, 399 N.E.2d 532, 534, 423 N.Y.S.2d 645, 647 (1979) (citing MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 10, 13 (Edward W. Cleary et al. eds., 2d ed. 1972); then citing 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 555–67 (1979); then citing 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1917–29 (1979); and then citing JEROME PRINCE, RICHARDSON ON EVIDENCE §§ 366–68 (10th ed. 1973)); *see* GUIDE TO N.Y. EVID. RULE 7.01(1), https://www.nycourts.gov/JUDGES/evidence/7-OPINION/7.01_OPINION%20OF%20EXPERT%20WITNESS.pdf.

457. 173 A.D.3d 1367, 1367, 102 N.Y.S.3d 778, 781 (3d Dep't 2019).

458. *Id*. at 1368–69, 102 N.Y.S.3d at 781–83.

459. *Id.* at 1367, 102 N.Y.S.3d at 781.

460. *Id*. at 1371, 102 N.Y.S.3d at 784.

461. *Id*. at 1372, 102 N.Y.S.3d at 785.

462. *Pascuzzi*, 173 A.D.3d at 1371, 102 N.Y.S.3d at 784.

463. *Id.* at 1375, 102 N.Y.S.3d at 787.

464. *Id*. at 1375–76, 102 N.Y.S.3d at 787–88.

death.[465] This expertise came from his conducting of over 10,000 autopsies, many of which involved high speed crashes.[466]

The court also rejected the argument by the defendant that the state police accident reconstructionist did not have the necessary qualifications in physics, biomechanical engineering, and occupancy kinematics to render an expert opinion as to the position of the occupants of the vehicle.[467] The basis for this rejection was the foundation proof that he had over 1,700 hours of collision reconstruction training in subjects that included applied physics, biomechanics, and occupant kinetics and that he had eighteen years of experience in accident reconstruction, participating in 541 reconstructions.[468]

The foundation proof in *Pascuzzi* for the testifying experts consisted of extensive personal experience in their respective fields as well as training and education.[469] The People with this proof certainly established the experts were qualified to give their opinions.[470] While the courts will not require such extensive experience and training in every case, and less experience and training may suffice, the teaching of *Pascuzzi* is some level of expertise in the subject matter of an expert's opinion is required to permit the expert to opine about matters in that area.[471] Attorneys must keep this in mind in their selection of an expert, ensuring that the expert has some knowledge of the subject matter about which the expert will opine.

In *O'Connor v. Kingston Hospital*, the estate of the decedent, who was a patient at the defendant hospital, commenced a medical malpractice action based on the hospital staff's alleged failure to prevent the decedent from developing pressure ulcers (commonly referred to as bedsores) prior to his death from cancer.[472] Damages for the decedent's conscious pain and suffering were sought.[473] Following the denial of the hospital's motion for summary judgment dismissing the complaint, the action proceeded to trial where the jury found the hospital was negligent, having departed from accepted standards of nursing practice and that the

465. *Id.* at 1376, 102 N.Y.S.3d at 788.

466. *Id.*

467. *Pascuzzi*, 173 A.D.3d at 1374–75, 102 N.Y.S.3d at 786–87 (citing People v. Lashway, 112 A.D.3d 1222, 1223–24, 978 N.Y.S.2d 388, 391 (3d Dep't 2013)). While the defendant had not objected to the testimony on this ground at trial, and thus had not preserved the argument for appeal, the court addressed it as if the argument had been preserved. *Id.*

468. *Id.*

469. *See id.* at 1374–76, 102 N.Y.S.3d at 787–88.

470. *See id.*

471. *Pascuzzi*, 173 A.D.3d at 1374–76, 102 N.Y.S.3d at 787–88.

472. 166 A.D.3d 1401, 1401, 88 N.Y.S.3d 679, 681 (3d Dep't 2018).

473. *Id.*

departure was the cause of the decedent's injuries, and upon those findings awarded monetary damages.[474]

At issue on the appeal from the judgment entered, which brought up for review the denial of the summary judgment motion and the jury verdict, was the admissibility of the expert opinions of the plaintiff's proffered expert witness, a registered nurse, whose opinions were submitted by the plaintiff in opposition to the motion and were adduced at trial.[475] The proffered witness was a registered nurse with over thirty-five years of experience treating patients for bedsores.[476] In an affidavit submitted in opposition to the motion, she opined, to a reasonable degree of certainty, that the hospital staff's treatment of decedent deviated from good and accepted nursing care, specifying several departures, and that these deviations from the standard of care caused the decedent's condition to worsen; and, had he received proper care, the pressure ulcers would not have formed or progressed as they did.[477] At trial, she also testified that the staff deviated from the accepted standard of nursing care by its failure to properly and consistently calculate the decedent's Braden score, which predicts a patient's risk of developing pressure ulcers, to provide him with an air mattress, and to reposition him often with sufficient frequency.[478]

The defendant hospital argued that the nurse was not qualified to give these opinions, as they were matters that only a physician could testify to.[479] The court rejected the argument.[480] The court found that the witness's testimony in which she gives her opinion on the causes and treatment of bedsores was within the knowledge, practice and experience of a registered nurse, and that she was qualified to deliver such testimony.[481] The court similarly concluded that she was qualified to give her trial opinions as she was certainly qualified, based on her experience

474. *Id.*

475. *Id.* at 1402, 88 N.Y.S.3d at 682.

476. *Id.*

477. *O'Connor*, 166 A.D.3d at 1402, 88 N.Y.S.3d at 681.

478. *Id.* at 1403, 88 N.Y.S.3d at 682–83.

479. *See id.* (first citing Matter of Sarro v. State of N.Y. Dep't. of Health Admin. Review Bd. for Prof'l Med. Conduct, 113 A.D.3d 698, 969, 979 N.Y.S.2d 188, 189 (3d Dep't 2014); and then citing Zak v. Brookhaven Mem'l. Hosp. Med. Ctr., 54 A.D.3d 852, 853, 863 N.Y.S.2d 821, 823 (2d Dep't 2008) (ruling that nurse not qualified to give expert opinion on cause of an injury and decedent's underlying condition).

480. *Id.* (first citing *Sarro*, 113 A.D.3d at 969, 979 N.Y.S.2d at 189; and then citing *Zak*, 54 A.D.3d at 853, 863 N.Y.S.2d at 823).

481. *Id.* at 1402, 88 N.Y.S.3d at 682 (first citing *Zak*, 54 A.D.3d at 853, 863 N.Y.S.2d at 823; then citing Mills v. Moriarty, 302 A.D.2d 436, 436, 754 N.Y.S.2d 901, 902 (2d Dep't 2003), *lv denied* 100 N.Y.2d 502, 790 N.E.2d 1194, 760 N.Y.S.2d 765 (2003)).

as an expert in the field of nursing care.[482] In that regard, the court pointed out that none of her opinions exceeded the boundaries of her testified to expertise or delved into matters that required testimony from a physician.[483]

O'Connor is instructive as it informs attorneys that once the qualifications foundation is established, care must be taken to avoid eliciting testimony outside the scope of that expertise.[484] Of course, that problem can be obviated by presenting a full representation of the expert's experience and training.[485]

In *Vergine v. Phillips*, the Third Department addressed an issue of first impression, whether a licensed clinical social worker ("LCSW") is qualified to render an opinion that a plaintiff in a motor vehicle accident case is suffering from post-traumatic stress disorder ("PTSD"), which was caused by the accident.[486] The plaintiff was involved in a motor vehicle accident and as a result of that accident she claimed she was suffering from PTSD.[487] She further claimed that PTSD can constitute a "serious injury" for purposes of New York's No-Fault law, which would allow her to recover damages for her PTSD.[488]

The Third Department initially held that PTSD causally related to a motor vehicle accident can constitute a serious injury.[489] Having so held, the court then addressed the issue of whether medical proof of causally-related PTSD is then required to establish a serious injury.[490] It concluded that while PTSD can certainly be diagnosed by psychiatrists, neuropsychologists, and psychologists, there was no bar to allowing a

482. *O'Connor*, 166 A.D.3d at 1402, 88 N.Y.S.3d at 682 (first citing *Sarro*, 113 A.D.3d at 969, 979 N.Y.S.2d at 189; and then citing *Zak*, 54 A.D.3d at 853, 863 N.Y.S.2d at 823).

483. *Id.* (first citing *Sarro*, 113 A.D.3d at 969, 979 N.Y.S.2d at 189; and then citing *Zak*, 54 A.D.3d at 853, 863 N.Y.S.2d at 823).

484. *Id.* (first citing *Sarro*, 113 A.D.3d at 969, 979 N.Y.S.2d at 189; and then citing *Zak*, 54 A.D.3d at 853, 863 N.Y.S.2d at 823).

485. *Id.* (first citing *Zak*, 54 A.D.3d at 853, 863 N.Y.S.2d at 823; and then citing *Mills*, 302 A.D.2d at 436, 754 N.Y.S.2d at 902, *lv denied* 100 N.Y.2d at 502, 790 N.E.2d at 1194, 760 N.Y.S.2d at 765).

486. 167 A.D.3d 1319, 1320, 91 N.Y.S.3d 272, 274 (3d Dep't 2018).

487. *Id.* at 1319–20, 91 N.Y.S.3d at 273 (citing N.Y. INS. LAW § 5102(d) (McKinney 2019)).

488. *Id.* (citing INS. § 5102(d)).

489. *Id.* (first citing Fillette v. Lundberg, 150 A.D.3d 1574, 1578, 55 N.Y.S.3d 783, 787 (3d Dep't 2017); then citing Hill v. Cash, 117 A.D. 1423, 1425, 985 N.Y.S.2d 345, 348 (4th Dep't 2014); then citing Krivit v. Pitula, 79 A.D.3d 1432, 1434, 912 N.Y.S.2d 789, 791 (3d Dep't 2010); and then citing Chapman v. Capoccia, 283 A.D.2d 798, 800, 725 N.Y.S.2d 430, 432 (3d Dep't 2001)).

490. *Id.* (quoting Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 1200, 746 N.Y.S.2d 865, 868 (2002)).

LCSW from also giving that opinion.[491] To support this conclusion, the court noted that a LCSW can diagnose mental and emotional disorders and disabilities and create assessment based treatment matters, tasks that are comparable to those of a psychologist, and a LCSW must have extensive supervised clinical work experience under the supervision of a psychiatrist.[492]The work of these medical professionals was thus comparable to the work of a LCSW, and no policy reason was applicable which would prevent the LCSW from giving a causally-related PTSD diagnosis.[493]

Vergine is important since the court held, as a matter of first impression, that a LCSW can give a PTSD diagnosis, notwithstanding the LCSW is not medically trained.[494] What counts is the LCSW's actual practice and experience in the PTSD field.[495]

B. Bases

In *Matter of New York City Asbestos Litigation*, the Court of Appeals upheld the dismissal of a claim on behalf of a deceased automobile mechanic alleging that his mesothelioma was caused by asbestos found in defendant Ford Motor Company's brakes, clutches, and gaskets.[496] The Memorandum decision of the Court stated only:

> Viewing the evidence in the light most favorable to plaintiffs, the evidence was insufficient as a matter of law to establish that respondent Ford Motor Company's conduct was a proximate cause of the decedent's injuries pursuant to the standards set forth in *Parker v. Mobil Oil Corp*. and *Cornell v. 360 W. 51st St. Realty*. Accordingly, on this particular record, defendant was entitled to judgment as a matter of law under CPLR 4404(a).[497]

The Court in *Parker* and *Cornell* set forth expert testimony reliability standards for toxic tort cases.[498] *Parker* held that expert testimony on causation was necessary and that testimony must set forth a plaintiff's exposure to a toxin; that the toxin is capable of causing the

491. *Vergine*, 167 A.D.3d at 1320–21, 91 N.Y.S.3d at 274.

492. *Id.* (quoting N.Y. EDUC. LAW §§ 7601-a(1)–(2), 7701(2)(a), 7704(2)(c) (McKinney 2019)).

493. *Id.*

494. *Id.*

495. *Id.*

496. 32 N.Y.3d 1116, 1118, 116 N.E.3d 75, 75, 91 N.Y.S.3d 784, 784 (2018).

497. *Id.* (first citing 7 N.Y.3d 434, 448, 857 N.E.2d 1114, 1121, 824 N.Y.S.2d 584, 590 (2006); then citing 22 N.Y.3d 762, 786, 9 N.E.3d 884, 900–01, 986 N.Y.S.3d 389, 405–06 (2014); and then citing N.Y. C.P.L.R. 4404(a) (McKinney 2019)).

498. *Parker*, 7 N.Y.3d at 449, 857 N.E.2d at 1121, 824 N.Y.S.2d at 591; *Cornell*, 22 N.Y.3d at 783, 9 N.E.3d at 889, 986 N.Y.S.3d at 404.

particular injuries plaintiff suffered, so called general causation, and that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries, so-called specific causation.[499] *Cornell* noted that although it is not always necessary for a plaintiff to qualify exposure levels precisely, "at a minimum, . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered."[500]

What is the significance, if any, of this brief Memorandum opinion? To answer that question, one must look at the Appellate Division, First Department, decision the Court was affirming.[501] Three separate opinions were issued.[502]

The First Department majority had found the plaintiff's proof insufficient, observing the fact that asbestos had been linked to mesothelioma "is not enough for a determination of liability against a particular defendant; a causation expert must still establish that the plaintiff was exposed to sufficient levels of the toxin from the defendant's products to have caused the disease."[503] Even if qualification of the plaintiff's exposure is not possible, "causation from exposure to toxins in a defendant's products must be established through some scientific method."[504] The majority then found that the plaintiff's proof was insufficient because it did not establish that the "decedent's mesothelioma was a result of his exposure to a sufficient quantity of asbestos in friction products sold or distributed by Ford Motor Company."[505]

The dissenting opinion observed that although the Court of Appeals had not addressed the issue of sufficiency of causation proof in asbestos cases, nonetheless a consensus from the medical and scientific communities had developed that even low doses of asbestos exposure can cause mesothelioma, and thus he would have found the plaintiff's proof

499. *Parker*, 7 N.Y.3d at 448, 857 N.E.2d at 1120–21, 824 N.Y.S.2d at 590 (first citing McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1241 (11th Cir. 2005); and then citing Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1107 (8th Cir. 1996)).

500. *Cornell*, 22 N.Y.3d at 784, 9 N.E.3d at 899, 986 N.Y.S.3d at 404 (quoting *Wright*, 91 F.3d at 1107).

501. Matter of N.Y.C. Asbestos Litig., 148 A.D.3d 233, 256, 48 N.Y.S.3d 365, 382 (1st Dep't 2017).

502. *Id*. at 235, 240, 241, 48 N.Y.S.3d at 367, 371, 373.

503. *Id*. at 236, 48 N.Y.S.3d at 367.

504. *Id*.

505. *Id*. at 236–37, 48 N.Y.S.3d at 368.

on exposure sufficient.[506] A concurring opinion viewed the dissent as urging an "exception to the settled rule of *Parker*."[507]

The Court of Appeals Memorandum adopted the First Department majority's approach.[508] In doing so, it rejected the dissenting opinion's view of the law.[509] The result is that the toxic tort standards of *Parker* and *Cornell* are applicable in asbestos cases.[510] Perhaps more significantly, the Memorandum continues the approach set forth in *Parker* and *Cornell*.[511]

C. Frye

New York follows the *Frye* standard in determining the admissibility of expert testimony based on scientific principles or procedures.[512] The *Frye* standard, which is applicable only with respect to new scientific principles or procedures, asks whether they principle or procedure relied upon by an expert in formulating an opinion has gained general acceptance in its specified field.[513] Ordinarily, whether that standard is met is an issue to be decided at a hearing.[514]

At issue in *Shah v. Rahman*, a motor vehicle accident case, was whether the trial court erred in allowing the defendants' expert, a biomechanical engineer, to opine that the accident could not have caused plaintiff's injuries based upon his application of biomechanical principles, without first conducting a hearing as to whether these principles are generally accepted.[515] The Appellate Division, Second Department, held no error was committed.[516] In so ruling, the court noted

506. *Matter of N.Y.C. Asbestos Litig.*, 148 A.D.3d at 251, 48 N.Y.S.3d at 379 (Feinman, J., dissenting).

507. *Id.* at 242, 48 N.Y.S.3d at 372 (Kahn, J., concurring) (citing Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 447, 857 N.E.2d 1114, 1120, 824 N.Y.S.2d 584, 589 (2006)).

508. *Id.* at 235–236, 48 N.Y.S.3d at 368.

509. *Id*. at 238–240, 48 N.Y.S.3d at 369–371.

510. *Id*. at 236, 48 N.Y.S.3d at 368 (first citing *Parker*, 7 N.Y.3d at 447, 857 N.E.2d at 1120, 824 N.Y.S.2d at 589; then citing Cornell v. 360 W. 51st St. Realty, 22 N.Y.3d 762, 780, 9 N.E.3d 884, 896–98, 986 N.Y.S.2d 389, 402–03 (2014)).

511. *Matter of N.Y.C. Asbestos Litig.*, 148 A.D.3d at 236, 48 N.Y.S.3d at 368.

512. People v. Wesley, 83 N.Y.2d 417, 422, 633 N.E.2d 451, 453–54, 611 N.Y.S.2d 97, 99–100 (1994) (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

513. *Id.* at 422, 633 N.E.2d at 454, 611 N.Y.S.2d at 100.

514. *See* Styles v. General Motors Corp., 20 A.D.3d 338, 799 N.Y.S.2d 38 (1st Dep't 2005).

515. 167 A.D.3d 671, 673, 88 N.Y.S.3d 228, 230 (2d Dep't 2018) (first citing *Parker*, 7 N.Y.3d at 447, 857 N.E.2d at 1120, 824 N.Y.S.2d at 589; then citing Vargas v. Sabri, 115 A.D.3d 505, 505, 981 N.Y.S.2d 914, 914 (1st Dep't 2014); then citing Plate v. Palisade Film Delivery Corp., 39 A.D.3d 835, 837, 835 N.Y.S.2d 324, 326 (2d Dep't 2007); and then citing Cardin v. Christie, 283 A.D.2d 978, 979, 723 N.Y.S.2d 912, 913 (4th Dep't 2001)).

516. *Id.*

that a hearing is not required when general acceptance can be demonstrated by other acceptable means.[517]

Here, the defendant's attorney informed supreme court that another supreme court judge had recently permitted the expert to testify in another case and give an opinion based on the same biomechanical principles that will be used in the present case.[518] The Second Department held that a court need not conduct a *Frye* hearing when "it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony."[519] In this "particular case," the court then held the trial court properly exercised discretion in following a fellow supreme court judge's ruling.[520] However, the court's decision suggests that such reliance may not always be proper by its reference that it was permissible in this *particular* case.[521] Attorneys may want to rely on more than one judicial ruling to establish a principle or procedure as generally accepted, and not a single, possibly outlier ruling.

VIII. PRIVILEGES

A. Attorney-Client

New York's attorney-client privilege, as codified in CPLR 4503(a), protects against disclosure of a "confidential communication made between the attorney or his or her employee and the client in the course of professional employment."[522] The scope of this protection against disclosure given to communications between an attorney and the attorney's client was at issue in *Wrubleski v. Mary Imogene Basset Hospital*.[523]

In this wrongful death medical malpractice action, the decedent was injured when she fell while working out at a gym.[524] She underwent

517. *Id.* at 672, 88 N.Y.S.3d at 230 (first citing Lipschitz v. Stein, 65 A.D.3d 575, 575, 884 N.Y.S.2d 442, 444 (2d Dep't 2009); then citing Cornell v. 360 W. 51st St. Realty, LLC, 22 N.Y.3d 762, 780, 9 N.E.3d 884, 896–98, 986 N.Y.S.2d 389, 402–03 (2014); then citing *Parker*, 7 N.Y.3d at 447, 857 N.E.2d at 1120, 824 N.Y.S.2d at 589; then citing *Wesley*, 83 N.Y.2d at 423, 633 N.E.2d at 454, 611 N.Y.S.2d at 100; and then citing Ratner v. McNeil-PPC, 91 A.D.3d 63, 71–72, 933 N.Y.S.2d 323, 339 (2d Dep't 2011)).

518. *Id.* at 671, 88 N.Y.S.3d at 229–30.

519. *Id.* at 673, 88 N.Y.S.3d at 230 (quoting People v. LeGrand, 8 N.Y.3d 449, 458, 867 N.E.2d374, 379–81, 835 N.Y.S.2d 523, 528–30 (2007)).

520. *Id.*

521. *Id.*

522. N.Y. C.P.L.R. 4503(a)(1) (McKinney 2019).

523. 163 A.D.3d 1248, 1251, 81 N.Y.S.3d 606, 609 (3d Dep't 2018). The author represented the plaintiff on the appeal.

524. *Id.* at 1249, 81 N.Y.S.3d at 607.

surgery a few days later to repair a tear of her left hamstring.[525] Afterwards, she retained an attorney to represent her in a lawsuit pertaining to the injuries she sustained.[526] As part of that representation, the attorney directed decedent to prepare a written summary of the events that led to her fall and injuries and to keep a medical journal of her treatment.[527] The attorney instructed decedent to write the words "to my lawyer at the beginning of the medical journal to clearly designate it is a confidential document to be protected by the attorney-client privilege."[528] The decedent followed this instruction and drafted an "injury journal" consisting of several pages of handwritten notes containing an account of her fall and subsequent medical treatment.[529] She also included in these notes a log of the medications she was taking in connection with her post-operative care.[530]

A few days after she had started making these notes, she died suddenly from a pulmonary embolism.[531] When her husband discovered the notes after her death, he provided them to the retained attorney.[532] Subsequently, an action was commenced against the physicians and hospital involved in her treatment after she fell.[533] During the deposition of the husband, it was disclosed to the defendants that the decedent had made the notes and that the notes had been given to the attorney.[534] When the attorney demanded production of the notes, the attorney refused to provide them, asserting they were protected against disclosure by the attorney-client privilege, and a motion to compel was made by defendants.[535] The supreme court directed production only of the medication log.[536]

The Third Department affirmed the supreme court's ruling.[537] In doing so it made several significant rulings.[538] Initially, it must be noted that implicit in the court's decision is that the court found the injury log and chronology of events to be protected by the privilege as it was a

525. *Id.*
526. *Id.*
527. *Id.*
528. *Wrubleski*, 163 A.D.3d at 1249, 81 N.Y.S.3d at 607.
529. *Id.*
530. *Id.* at 1249, 81 N.Y.S.3d at 607–08.
531. *Id.* at 1249, 81 N.Y.S.3d at 607.
532. *Id.*
533. *Wrubleski*, 163 A.D.3d at 1249, 81 N.Y.S.3d at 607.
534. *Id.* at 1249, 81 N.Y.S.3d at 608.
535. *Id.*
536. *Id.* at 1250, 81 N.Y.S.3d at 608.
537. *Id.*
538. *See Wrubleski*, 163 A.D.3d at 1250–51, 81 N.Y.S.3d at 608–09.

communication made by decedent to her attorney for purposes of securing legal advice.[539] The fact that the notes were never delivered to her attorney before her death was irrelevant because they were prepared for and intended to be delivered to the attorney.[540] The legal nature of the communication was confirmed by the decedent's placement of the words "to my lawyer" on the first page of the notes.[541] Also, implicit in the court's opinion is that the court found the notes were intended to be limited for disclosure to her attorney, thus indicating the communication was a confidential one.[542]

The production of the medication log ordered by supreme court was proper because, the court found, it was kept not for purposes of legal advice but of a personal nature.[543] This finding was based on the fact that the attorney did not request that she keep a medication log; the medication log she maintained was kept on a separate page; and that page contained other notes of a personal nature.[544] Confirming this conclusion was the fact that decedent was a nurse, and thus it could be concluded that she kept the medication log to make sure she was taking all of her prescribed medications, which purpose was thus not for the securing of legal advice.[545] In short, there was insufficient proof that the medication log was kept for purposes of securing legal advice.[546]

The takeaway from *Wrubleski* is that when an attorney instructs a client to prepare notes regarding what led the client to seek legal advice and other related matters, those notes so prepared will be protected by the attorney-client privilege.[547] To ensure that protection against disclosure the client should always be instructed to write on the front page of the writing "to my attorney."[548]

B. Material Prepared in Anticipation of Litigation

CPLR 3121(a) provides that where a plaintiff puts his or her physical or mental condition at issue, the defendant may require the plaintiff to submit to an independent medical examination ("IME") retained by

539. *See id.* at 1251, 81 N.Y.S.3d at 609 (declining to overturn the trial court's denial of defendant's motion to compel production of the injury journal).

540. *See id.* at 1249–50, 81 N.Y.S.3d at 607–08.

541. *See id.*

542. *Id.* at 1249, 81 N.Y.S.3d at 607.

543. *Wrubleski*, 163 A.D.3d at 1251, 81 N.Y.S.3d at 609.

544. *Id.*

545. *Id.*

546. *Id.*

547. *See id.* at 1249, 81 N.Y.S.3d at 607.

548. *See Wrubleski*, 163 A.D.3d at 1249, 81 N.Y.S.3d at 607.

defendant specifically for that purpose.[549] Plaintiffs in responding to an IME request will often be accompanied by a representative who will observe the examination and such practice is permissible, provided the representative does not interfere with the examination.[550] When that representative takes notes as to what was observed, are those notes discoverable by the defendant? This issue was addressed by the Appellate Division, First Department, in *Markel v. Pure Power Boot Camp, Inc.*[551]

After the plaintiff's IME was conducted during which she had a representative present, the defendant moved to compel production of her representative's notes, reports and other relevant material involving the IME.[552] Contending the sought after materials were protected against disclosure by CPLR 3101(d)(2), [553] the plaintiff moved for a protective order preventing disclosure.[554] That provision gives conditional or qualified protection to material generated by an attorney in anticipation of litigation, but that protection gives way if the party seeking disclosure has a "substantial need" for them in the preparation of the case and that without "undue hardship" the requesting party is unable to obtain the substantial equivalent by other means.[555] The supreme court denied the motion for a protective order and directed the requested material to be produced.[556]

The First Department reversed and granted the plaintiff's motion.[557] In a comprehensive opinion authored by Justice Judith Gische, the court initially noted that the materials sought were not protected by the attorney-client privilege as they were not communications between a client and the client's attorney or the attorney's representative, nor were they attorney protected work product as they were not generated by an attorney.[558] Addressing the issue whether they were then protected as materials prepared for litigation under CPLR 3101(d)(2), the court held

549. N.Y. C.P.L.R. 3121(a) (McKinney 2019).

550. *See* Santana v. Johnson, 154 A.D.3d 452, 452, 60 N.Y.S.3d 831, 832 (1st Dep't 2017); *see also* Guerra v. McBean 127 A.D.3d 462, 462, 4 N.Y.S.3d 526, 526 (1st Dep't 2015), Henderson v. Ross 147 A.D.3d 915, 916, 47 N.Y.S.3d 136, 137 (2d Dep't 2017), Marriott v. Cappello, 151 A.D.3d 1580, 1582, 56 N.Y.S.3d 691, 693 (4th Dep't 2017).

551. 171 A.D.3d 28, 30, 96 N.Y.S.3d 187, 189 (1st Dep't 2019).

552. *Id*. at 29, 96 N.Y.S.3d at 188.

553. C.P.L.R. 3101(d)(2).

554. *Markel*, 171 A.D.3d at 29, 96 N.Y.S.3d at 188.

555. C.P.L.R. 3101(d)(2).

556. *Markel*, 171 A.D.3d at 32, 96 N.Y.S.3d at 190.

557. *Id*. at 32, 96 N.Y.S.3d at 190–91.

558. *Id*. at 31, 96 N.Y.S.3d at 189–90 (first citing C.P.L.R. 3101(a)(4); then citing Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 624, 57 N.E.3d 30, 35, 36 N.Y.S.3d 838, 843 (2016)).

they were.[559] In reaching that conclusion, the court found that the representative had been tasked by the plaintiff's attorney to accompany the plaintiff to the IME, and thus was acting as the attorney's agent for purposes of the statute.[560] The court then had no trouble in concluding that the representative's notes were materials prepared in anticipation of litigation as they were made to assist in the preparation of a response to the IME physician's possible testimony at trial.[561] Lastly, the court concluded that defendants failed to establish the requisite need and hardship to obtain the notes because their access to their IME doctor undermined any argument of need and hardship.[562] In sum, the representative's notes were protected against disclosure.[563] In so holding, the court observed that an "important consideration" in its analysis of the issue was the representative "will not be testifying at trial on plaintiff's affirmative case."[564] Upon making that observation, the court then stated that it was not deciding whether disclosure would be required if the representative was called to testify on the plaintiff's direct case.[565] What was on the court's mind in stating that? Obviously, to the court other issues would then be present that would have to be addressed to determine if disclosure were then required.[566]

C. Physician-Patient

CPLR 4504(a), which sets forth New York's physician-patient privilege, prevents disclosure of a patient's sensitive medical information by providing that:

> [u]nless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional

559. *Id.* at 31, 96 N.Y.S.3d at 190.

560. *Id.* at 32, 96 N.Y.S.3d at 190.

561. *Markel*, at 31–32, 96 N.Y.S.3d at 190 (citing Hudson Ins. Co. v. Oppenheim, 72 A.D.3d 489, 489–90, 899 N.Y.S.2d 29, 30 (1st Dep't 2010)).

562. *Id.* at 32, 96 N.Y.S.3d at 190 (first citing *Hudson*, 72 A.D.3d at 490, 899 N.Y.S.2d at 30; and then citing Forman v. Henkin, 30 N.Y.3d 656, 662, 93 N.E.3d 882, 887, 70 N.Y.S.3d 157, 162 (2018)).

563. *Id.* (citing C.P.L.R. 3101(d)(2)).

564. *Id.*

565. *Id.* (citing Santana v. Johnson, 154 A.D.3d 452, 452, 60 N.Y.S.3d 831, 832 (1st Dep't 2017)).

566. *See generally* Michael J. Hutter, *Markel and the Discovery Privileges*, N.Y.L.J. (June 6, 2019), https://www.law.com/newyorklawjournal/2019/06/05/markel-and-the-discovery-privileges/ (discussing what those other issues might be).

> capacity, and which was necessary to enable him to act in that capacity.[567]

As to a waiver of the privilege, the Court of Appeals has held waiver will be present when the person commences a personal injury action in which the person's "mental or physical condition is affirmatively put in issue."[568] Under this standard, where a plaintiff seeks to recover damages as a result of a pleaded injury to a specific body part, *e.g*., knee, neck, the plaintiff will be deemed to have waived the privilege with respect to all medical records pertaining to that body part.[569]

Whether under Court of Appeals precedent a waiver of the privilege occurs as to medical records pertaining to prior treatment or prior injuries that are not pleaded in the action where the plaintiff makes a claim of loss of enjoyment of life, lost earnings or reduced life expectancy from the pleaded injuries was an issue over which the Appellate Division, First Department, and the Appellate Division, Second Department, split.[570] The Second Department held in *Kakharov v. Archer* that waiver will always be present in those circumstances,[571] but the First Department rejected that position in *Brito v. Gomez*, holding that pleading loss of enjoyment of life as well as lost earnings alone does not place plaintiff's entire medical condition in controversy.[572] The court in *Brito* stated as to its holding: "We are not persuaded by the reasoning of the Second Department.[573] In our view, the Second Department's precedent cannot be reconciled with the Court of Appeals' rulings that the physician-patient privilege is waived only for injuries affirmatively placed in controversy."[574] The position of the Appellate Division Third and Fourth Departments is not clear.[575]

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567. C.P.L.R. 4504(a).

568. Koump v. Smith, 25 N.Y.2d 287, 294, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858, 864 (1969).

569. *Id*. at 295, 250 N.E.2d at 862, 303 N.Y.S.2d 866 ("Manifestly, if a plaintiff in a negligence action asserts a mental or physical injury, he places that condition in controversy within the meaning of the [standard].").

570. *See* Kakharov v. Archer, 166 A.D.3d 746,746, 85 N.Y.S.3d 780, 781 (2d Dep't 2018); Brito v. Gomez, 168 A.D.3d 1, 8, 88 N.Y.S.3d 166, 172 (1st Dep't 2018).

571. *Kakharov* 166 A.D.3d at 746, 85 N.Y.S.3d at 781 (citing M.C. v. Sylvia March Equities, Inc., 103 A.D.3d 676, 679, 959 N.Y.S.2d 280, 283 (2d Dep't 2013)).

572. *Brito*, 168 A.D.3d at 8, 88 N.Y.S.3d at 172.

573. *Id*.

574. *Id*.

575. *See* Michael J. Hutter, *Waiver of the Physician-Patient Privilege in the Aftermath of Brito v. Gomez*, N.Y.L.J. (Oct. 3, 2019), https://www.law.com/newyorklawjournal/2019/10/02/waiver-of-physician-patient-privilege-in-the-aftermath-of-brito-v-gomez/ (first citing McLeod v. Metropolitan Transp. Auth., No. 105945/2011, 2015 N.Y. Slip Op. 50705(U), at 5 (Sup. Ct. N.Y. Cty. May 7, 2015); then

With this split on an important issue in personal injury litigation, the First Department granted leave to appeal to the Court of Appeals.[576] The Court of Appeals in a terse decision reversed the First Department, stating waiver was present "under the particular circumstances of this case."[577] Whether the Court was adopting the Second Department's position or was adopting some variation thereof is not clear.[578] Further litigation concerning this issue can be expected.

citing Cianciullo-Birch v. Champlain Ctr. N. L.L.C., No. 2012-1582, 2016 N.Y. Slip Op. 50885(U), at 3–4 (Sup. Ct. Clinton Cty. June 10, 2016); and then citing Wolf v. Walgreens Boots All., Inc., No. 156071/2015, 2017 Slip Op. 31225(U), at 4 (Sup. Ct. N.Y. Cty. June 5, 2017)).

576. *See* Brito v. Gomez, 33 N.Y.3d 1126, 1127, 131 N.E.3d 904, 904, 107 N.Y.S.3d 797, 797 (2019).

577. *Id*. at 1127, 131 N.E.3d at 905, 107 N.Y.S.3d at 797.

578. *See id*.