EVIDENCE

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INTRODUCTION

This annual *Survey* will proceed through the traditional evidence categories for a review of those cases decided during the *Survey* year that are of particular interest to the bench and bar. While the number of evidentiary decisions decided are considerably less than the number of decisions from prior years due to shutdown of the courts due to the COVID-19 pandemic, the significance of those decided cases makes up for the lack of volume.

I. APPEAL OF EVIDENTIARY RULINGS

A. Appealability

A longstanding New York appellate practice rule is that a ruling made during the course of a trial on the admissibility of evidence is not separately appealable and is only reviewable on appeal from the judgment rendered after trial.[1] The rationale underlying this rule is that if such appeals were permitted, the trial process would be interfered with and impeded, and the appellate courts overwhelmed by "incessant appeals."[2] A corollary appellate practice rule provides that even evidentiary rulings made on an *in limine* motion and embodied in an order, complying with Civil Practice Law and Rules (CPLR) 2219,[3] are likewise reviewable only on an appeal from the judgment.[4] The rationale for this rule differs from the rationale underlying the rule for trial evidentiary rulings, namely, such a ruling "[does] not go to the merits of the case"[5] and is, at best, an "advisory opinion" which an

1. *See, e.g.*, Roman v. City of New York, 187 A.D.2d 390, 390, 590 N.Y.S.2d 714, 714 (1st Dep't 1992); Kopstein v. City of New York, 448 N.Y.S.2d 174, 175, 87 A.D.2d 547, 547 (1st Dept 1982); Lundy v. City of New York, 233 A.D. 763, 763, 250 N.Y.S. 811, 811 (2d Dep't 1931); *see also* DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE, 1003–04 (6th ed. 2018).

2. Oppenheimer v. Duophoto Corp., 271 A.D. 1005, 1005, 69 N.Y.S.2d 309, 309–10 (1st Dep't 1947).

3. N.Y. C.P.L.R. 2219 (McKinney 2020).

4. *See, e.g.*, Mayes v. Zawoliki, 55 A.D.3d 1386, 1386–87, 864 N.Y.S.3d 647, 648 (4th Dep't 2008) (quoting Crewell v. Albany Med. Ctr. Hosp., 52 A.D.3d 1233, 1233, 858 N.Y.S.2d 623, 623 (4th Dep't 2008)); Rodriguez v. Ford Motor Co., 17 A.D.3d 159, 160, 792 N.Y.S.2d 468, 470 (1st Dep't 2005) (citing Weatherbee Constr. Corp. v. Miele, 270 A.D.2d 182, 183, 705 N.Y.S.2d 222, 222 (4th Dep't 2000)).

5. Santos v. Nicolas, 65 A.D.3d 941, 941, 885 N.Y.S.2d 202, 202 (1st Dep't 2009) (comparing City of New York v. Mobil Oil Corp., 12 A.D.3d 77, 81, 783 N.Y.S.2d 75, 77 (2d Dep't 2004)).

appellate division department has no authority to review.[6] While both rules profess to no exceptions, the courts have, however, recognized an exception which will allow a separate appeal of an *in limine* evidentiary ruling, albeit without setting forth its basis and limitations.[7]

The Appellate Division, Second Department in *Thornhill v. Degen*,[8] and the Appellate Division, Third Department in *Burdick v. Tonaga, Inc*.[9] addressed the exception, with the appellants arguing the facts allowed them to invoke it.[10] Of note, the appeals in both cases were in the context of an *in limine* motion made by defendants seeking to preclude expert testimony pursuant to the standard commonly referred to as the *Frye* standard as it is derived from the decision in *Frye v. United States*.[11] In both cases, the appeals taken by the defendants from the denial of their *Frye* motions were dismissed, the appellate courts holding the appealed from order constituted a mere evidentiary ruling.[12] Their rationale, however, outlines when an

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6. Savarese v. New York Hous. Auth., 172 A.D.2d 506, 509, 567 N.Y.S.2d 855, 857 (2d Dep't 1991) (first citing Pellegrino v. New York City Transit Auth., 141 A.D.2d 709, 709, 529 N.Y.S.2d 1004, 1004 (2d Dep't 1988); then citing Mauro v. Vill. of Freeport, 113 A.D.2d 876, 876, 493 N.Y.S.2d 797, 798 (2d Dep't 1985); and then citing Cotgreave v. Pub. Adm'r of Imperial Cnty., 91 A.D.2d 600, 601, 456 N.Y.S.2d 432, 433 (2d Dep't 1982)).

7. *See* Michael J. Hutter, *2019-2020 Survey of New York Law: Evidence*, 71 SYRACUSE L. REV. 129, 140–41 (2021) (citing Reed v. N.Y. State Elec. & Gas Corp., 183 A.D.3d 1207, 1213, 125 N.Y.S.3d 475, 482 (3d Dep't 2020)) [hereinafter 2019-2020 Evidence Survey].

8. 185 A.D.3d 982, 982, 125 N.Y.S.3d 885, 885 (2d Dep't 2020).

9. 191 A.D.3d 1215, 1216, 143 N.Y.S.3d 129, 130 (3d Dep't 2021) (first citing Hurtado v. Williams, 129 A.D.3d 1284, 1284–85, 11 N.Y.S.3d 349, 350 (3d Dep't 2015); then citing *Thornhill*, 185 A.D.3d at 983, 125 N.Y.S.3d at 885; and then citing Strait v. Arnot Ogden Med. Ctr., 246 A.D.2d 12, 14, 675 N.Y.S.2d 457, 458 (3d Dep't 1998)).

10. *See Burdick*, 191 A.D.3d at 1215–16, N.Y.S.3d at 129–30.

11. 293 F. 1013, 1014 (D.C. Cir. 1923) (explaining that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained general acceptance in its specified field). For further discussion of the *Frye* rule, see i*nfra* Part VI (B).

12. *See Thornhill*, 185 A.D.3d at 983, 125 N.Y.S.3d at 885 (citing Dupree v. Voorhees, 102 A.D.3d 912, 913, 959 N.Y.S.2d 235, 236 (2d Dep't 2013)); *see also Burdick*, 191 A.D.3d at 1216–17, 143 N.Y.S.3d at 130 (first citing Hurtado v Williams, 129 A.D.3d 1284, 1284–85, 11 N.Y.S.3d 349, 350 (3d Dep't 2021); then citing Brindle v. Soni, 41 A.D.3d 938, 939, 836 N.Y.S.2d 744, 745 (3d Dep't 2007); and then citing Ferrara v. Kearney, 285 A.D.2d 890, 890, 727 N.Y.S.2d 358, 359 (3d Dep't 2001)).

otherwise non-appealable *in limine* "evidentiary ruling" becomes an appealable order.[13]

In *Burdick*, plaintiffs alleged that defendant, a manufacturing facility, improperly disposed of chemical compounds, thereby contaminating the water of private wells in the surrounding areas.[14] At the close of discovery, defendant moved *in limine* to preclude plaintiff's experts from offering their opinions on causation as their testimony failed to meet the *Frye* standard.[15] The supreme court denied the motion except as to one expert, and defendant appealed.[16] The Third Department concluded the order appealed from was not appealable as it "addressed *only* the issue of the admissibility of the testimonies of plaintiffs' experts."[17] In this regard, the court noted that if the ruling did more, such as limiting the scope of the issues or the theories of liability to be tried, or impacted the merits of the dispute between the parties, the order would have been appealable.[18] The court's dictum enumerated, in essence, when the non-appealability rule would not bar the appeal, articulating an exception to the rule that an *in limine* evidentiary ruling is not appealable.[19]

In *Thornhill*, a medical malpractice action, the defendants moved *in limine* to preclude the plaintiffs' experts from testifying regarding medical causation or, in the alternative, for a *Frye* hearing.[20] The Second Department dismissed defendants' appeal from the supreme court's order denying their motion as a mere non-appealable

13. *See Thornhill,* 185 A.D.3d at 983, 125 N.Y.S.3d at 885 (citing *Dupree*, 102 A.D.3d at 913, 959 N.Y.S.2d at 236); *see also Burdick*, 191 A.D.3d at 1216, 143 N.Y.S.3d at 130 (citing Lynch v. Carlozzi, 121 A.D.3d 1308, 1310, 995 N.Y.S.2d 292, 294 (3d Dep't 2014)).

14. *Burdick*, 191 A.D.3d at 1215, 143 N.Y.S.3d at 129–30.

15. *Id.* at 1215–16, 143 N.Y.S.3d at 130 (citing *Frye*, 293 F. at 1014).

16. *Id.* at 1216, 143 N.Y.S.3d at 130.

17. *Id*. (emphasis added) (first citing *Thornhill*, 185 A.D.3d. at 983, 125 N.Y.S.3d at 885; then citing *Brindle*, 41 A.D.3d at 939, 836 N.Y.S.2d at 746; and then citing *Ferrara*, 285 A.D.2d at 890 727 N.Y.S.2d at 358).

18. *See id.* (first citing *Lynch*, 121 A.D.3d at 1310, 995 N.Y.S.2d at 294; then citing Brown v. State, 250 A.D.2d 314, 320–21, 681 N.Y.S. 2d 170, 175 (3d Dep't 1998); and then citing C.H. v. Dolkart, 174 A.D.3d 1098, 1099, 104 N.Y.S.3d 404, 406 (3d Dep't 2019); and then citing Hurtado v Williams, 129 A.D.3d 1284, 1285, 11 N.Y.S.3d 349, 350 (3d Dep't 2021); and then citing *Brindle*, 41 A.D.3d at 939, 836 N.Y.S.2d at 746).

19. *See Burdick*, 191 A.D.3d at 1216, 143 N.Y.S.3d at 130.

20. *Thornhill,* 185 A.D.3d at 983, 125 N.Y.S.3d at 885 (citing *Frye*, 293 F. at 1014).

evidentiary ruling since the order did nothing more than address and decide the admissibility of the plaintiffs' experts' testimony.[21]

Implicit in the Second Department's decision is that if defendants could show that the ruling had a further impact on defendants' ability to present a defense an appeal would lie. In this regard, the Second Department was recognizing the exception the Third Department articulated expressly, albeit also in dictum.[22] Viewed together, *Burdick* and *Thornhill* have set forth an "exception" to the non-appealability of *in limine* evidentiary rulings.

Of note, CPLR 5701(a)(2) sets for appealability of right standards for non-final orders which encompass an appeal of an evidentiary ruling embodied in an order.[23] It has two prongs, an order made on motion which "involves some part of the merits" of the action,[24] or "affects a substantial right".[25] Those two provisions certainly encompass an *in limine* evidentiary ruling embodied in an order.[26] Viewed as such, it is the statutory authority for the "exception" recognized in *Burdick* and *Thornhill*. Indeed, it can be argued that the statutory conditions for the "exception" are better suited for determining whether an *in limine* evidentiary ruling is appealable then asking whether the ruling limits the scope of the issue or the theories of liability to be tried. Perhaps it is better to approach the "exception" under CPLR 5701(c)(2)(iv), (v) instead of the "exception" judicially created.

What course of action is proper when a trial court orally decides a motion *in limine* raising an evidentiary issue but fails or refuses to sign a proposed order reflection the oral order or ruling, thereby precluding a potential appeal by the losing party challenging the ruling? The Appellate Division, Second Department addressed this issue in *Charalabis v. Elnagar*.[27] The court in a comprehensive

21. *Id.* at 983, 125 N.Y.S.3d at 885 (first citing *Frye*, 293 F. at 1014; then citing Dupree v. Voorhees, 102 A.D.3d 912, 913, 959 N.Y.S.2d 235, 236 (2d Dep't 2013); and then citing Shanoff v. Golyan, 139 A.D.3d 932, 934, 34 N.Y.S.3d 78, 81 (2d Dep't 2016)).

22. *Id.* (first citing *Frye*, 293 F. at 1014; then citing *Dupree*, 102 A.D.3d at 913, 959 N.Y.S.2d at 236; and then citing *Shanoff*, 139 A.D.3d at 934, 34 N.Y.S.3d at 81).

23. N.Y. C.P.L.R. 5701(a)(2) (McKinney 2021).

24. *Id.* at 5701(a)(2)(iv).

25. *Id.* at 5701(a)(2)(v).

26. *See* Scalp & Blade v. Advest, Inc., 309 A.D.2d 219, 223, 765 N.Y.S.2d 92, 95–96 (4th Dep't 2003) (citing N.Y. C.P.L.R. 5701(a)(2)(iv)–(v) (McKinney 2021)).

27. *See* 188 A.D.3d 44, 44, 132 N.Y.S.3d 129, 133 (2d Dep't 2020).

decision authored by Justice Mark Dillon noted initially that parties are entitled to orders that are both enforceable and appealable and comply with CPLR 2219(a),[28] and that "those fundamental rights should not be thwarted by any jurist's unwitting failure to be abide by the requirements of CPLR 2219(a)."[29] Where the trial judge fails to issue an appealable paper, the remedy is to commence a proceeding pursuant to CPLR article 78 in the nature of mandamus to get the trial judge to issue a written order that could then be appealed.[30]

B. Preservation

There was an abundance of decisions from the Appellate Division departments rejecting a claim of error by a trial court regarding the admission of evidence on the ground the claim was not preserved for review because the appellant had failed to make an appropriate objection to the evidence when offered at trial. Several of these decisions are worth discussing as they are friendly reminders of the consequences of the failure to preserve error and the mechanics of preserving error for appellate review.

In the *Matter of Ingber*, the co-executors of the estate of the managing member of a limited liability company (LLC) to which the respondent bank had loaned funds commenced a probate proceeding in the Surrogate's Court against the bank.[31] The bank had obtained a deficiency judgment against the LLC following a foreclosure action and filed a claim against the estate seeking payment of the balance of the loans still outstanding.[32] The petitioners sought dismissal of the claim.[33] At a hearing on the claim, the bank's chief executive officer (CEO) and chairperson testified regarding the amount of the claim and how it had been ascertained.[34] The testimony was supported by various bank documents admitted with the consent of petitioners'

28. N.Y. C.P.L.R. 2219(a) (McKinney 2021).

29. *Charalabidis*, 188 A.D.3d at 53, 132 N.Y.S.3d at 138 (first citing Brown v. 303 W. 42nd St. Realty Corp., 240 A.D.2d 248, 248–49, 658 N.Y.S.2d 308, 308 (1st Dep't 1997); then citing Lipson v. Dime Sav. Bank of N.Y., 203 A.D.2d 161, 162, 610 N.Y.S.2d 261, 262 (1st Dep't 1994); and then citing Double A Limousine Serv., Ltd. v. New York, N.Y. Limousine Serv. Inc., 130 A.D.2d 403, 404, 515 N.Y.S.2d 440, 442 (1st Dep't 1987)).

30. *See id.* at 54, 132 N.Y.S.3d at 139.

31. 189 A.D.3d 1933, 1933–34, 139 N.Y.S.3d 385, 386–87 (3d Dep't 2020).

32. *Id.* at 1933–34, 139 N.Y.S.3d at 387.

33. *Id.* at 1934, 139 N.Y.S.3d at 387.

34. *See id.*

counsel.[35] Surrogate's Court found that the bank had a valid and enforceable claim against the estate.[36] On appeal, the petitioners argued that the bank had failed to prove its claim because the documents admitted into evidence did not meet the best evidence rule and were not authenticated.[37] The Appellate Division, Third Department held that this issue was not preserved for review because petitioners did not object to the testimony of the bank's CEO, nor did they move to strike his testimony.[38] The court further held that petitioners' failure to object to the admission of the documents waived any future objection that they may have had regarding the issue.[39] Lastly, the court commented about petitioners' argument stating "it is disingenuous for petitioners to question the validity of documents entered into evidence with their consent."[40]

The Appellate Division, Second Department addressed the preservation issue in *Smith v. Sommer*, a medical malpractice action.[41] At trial, supreme court admitted into evidence a certain manual offered by plaintiff to show that defendant surgeon's operative report for plaintiff's procedure was inconsistent with the manual, which he considered authoritative.[42] On appeal from the judgment entered against him, defendant argued that the manual should not have been admitted into evidence because it was hearsay.[43] The court held defendant's argument was not preserved for review by their general objection made at trial.[44] It noted that when the general objection is overruled, the defendants "were required to make a specific objection on the ground now urged, and by failing to do so, they waived the objection."[45]

35. *See id.* at 1934–35, 139 N.Y.S.3d at 387.

36. In re *Ingber*, 189 A.D.3d at 1935, 139 N.Y.S.3d at 387.

37. *See id.* at 1935, 139 N.Y.S.3d at 388.

38. *See id.* (first citing N.Y. C.P.L.R. 4017, 5501(a)(3); and then citing Osborne v. Schoenborn, 216 A.D.2d 810, 811, 628 N.Y.S.2d 886, 887 (3d Dep't 1996)).

39. *Id.*

40. *Id.*

41. 189 A.D.3d 906, 908, 137 N.Y.S.3d 99, 101 (2d Dep't 2020).

42. *Id*. at 908, 137 N.Y.S.3d at 102–03 (first citing Fridovich v. Meinhardt, 247 A.D.2d 791, 792, 669 N.Y.S.2d 444, 446 (3d Dep't 1998); then citing Spensieri v. Lasky, 94 N.Y.2d 231, 239, 723 N.E.2d 544, 548, 701 N.Y.S.2d 689, 693 (1999)).

43. *Id.*

44. *Id.* (first citing People v. Vidal, 26 N.Y.2d 249, 254, 257 N.E.2d 886, 889, 309 N.Y.S.2d 336, 340 (1970); then citing Cooper v. Nestoros, 159 A.D.3d 1365, 1367, 72 N.Y.S.3d 666, 668 (4th Dep't 2018); and then citing Wolf v. Persuad, 130 A.D.3d 1523, 1525, 14 N.Y.S.3d 601, 602 (4th Dep't 2015)).

45. *Id.*

Where a timely and specific objection made to offered evidence is overruled, may an appellant argue the evidence should not have been admitted on a ground not raised before the trial court? The Appellate Division, Fourth Department in *People v. Smith* answered the question in the negative.[46] *Smith* was a criminal prosecution involving charges of burglary and robbery.[47] On the People's rebuttal case, when the People offered into evidence certain exhibits, defendant objected to their admission on the ground the exhibits created a "hearsay issue," and the objection was overruled.[48] On appeal from his judgment of conviction, defendant argued that the exhibits should not have been admitted, as there was an inadequate foundation supporting their admission, and in any event, the exhibits did not constitute proper rebuttal evidence.[49] The court held defendant "failed to preserve his present contentions for our review because they differ from th[at] raised before the trial court."[50] As recognized by the court, if a specific objection is overruled, only the ground specified can be considered on an appeal.[51] Counsel should be aware of this lack of preservation ground and raise before the trial court all relevant and non-frivolous grounds that would support exclusion of the evidence objected to.

The Appellate Division, Fourth Department in *People v. Ibrahim* addressed the need to object to a trial court's questioning of witnesses in order to preserve their appellate argument that the trial court's examination was improper.[52] In this drug prosecution, the trial court questioned extensively the People's expert witness.[53] No objection to

46. 187 A.D.3d 1652, 1654–55, 132 N.Y.S.3d 498, 501 (4th Dep't 2020) (quoting People v. Marra, 96 A.D.3d 1623, 1625, 946 N.Y.S.2d 783, 785–86 (4th Dep't 2012)) (first citing People v. Benton, 87 A.D.3d 1304, 1305, 930 N.Y.S.2d 522, 523 (4th Dep't 2011); then citing People v. Comerford, 70 A.D.3d 1305, 1306, 895 N.Y.S.2d 621, 622 (4th Dep't 2010)).

47. *Id.* at 1653, 132 N.Y.S.3d at 500.

48. *See id.* at 1654, 132 N.Y.S.3d at 501.

49. *See id.*

50. *Id.* (quoting *Marra*, 96 A.D.3d at 1625, 946 N.Y.S.2d at 785–86) (first citing *Benton*, 87 A.D.3d at 1305, 930 N.Y.S.2d at 523; then citing *Comerford*, 70 A.D.3d at 1306, 895 N.Y.S.2d at 622).

51. *See Smith,* 187 A.D.3d at 1654–55, 132 N.Y.S.3d at 501 (quoting *Marra*, 96 A.D.3d at 1625, 946 N.Y.S.2d at 785–86) (first citing *Benton*, 87 A.D.3d at 1305, 930 N.Y.S.2d at 523; then citing *Comerford*, 70 A.D.3d at 1306, 895 N.Y.S.2d at 622).

52. *See* 194 A.D.3d 1378, 1379, 147 N.Y.S.3d 836, 838 (4th Dep't 2021).

53. *See id.*

the examination was made by defendant.[54] Upon appeal from his judgment of conviction, defendant argued he was denied a fair trial by the trial court's questioning of the People's expert.[55] The court held the argument was not preserved for appeal, as defendant failed to make a timely, specific objection to an allegedly improper line of questioning.[56] While it is perhaps understandable why counsel would not object to a judge's questioning, *Ibrahim* instructs that any such reluctance will not excuse the failure to object.[57]

Lastly, the Appellate Division, Fourth Department in *Alex H. v. Aspyn L.* noted the importance of an offer of proof that must be made when a trial court sustains an objection to the offered evidence.[58] In this family court proceeding, petitioner father filed a paternity petition seeking a determination that he is the father of the subject child.[59] "A hearing was held on whether the father's assertion of paternity was in the best interests of the child, at which the father, the paternal grandmother, the child's therapist, the mother's friend, and the mother testified."[60] Family court abruptly concluded the hearing during the mother's cross-examination.[61] On the appeal from an order of filiation, determining that the father is the father of the subject child taken by the mother and the attorney for the child, the appellants argued that family court deprived them of a fair hearing by concluding the hearing during the mother's cross-examination.[62] The court initially held the argument was not preserved for review because appellants failed to object at the time the court indicated that it was prepared to rule on the paternity petition without the need for further evidence, and they waited until after an adverse determination was issued before claiming

54. *See id.*

55. *Id.*

56. *Id.* (first citing People v. Charleston, 56 N.Y.2d 886, 888, 438 N.E.2d 1114, 1115, 453 N.Y.S.2d 399, 400 (1982); then citing People v. Pham, 178 A.D.3d 1438, 1438 (4th Dep't 2019)).

57. Of note, the Fourth Department also held that defense counsel at trial was not ineffective for failing to object to the trial court's examination. *Ibrahim*, 194 A.D.3d at 1379, 147 N.Y.S.3d at 838 (citing People v. Baldi, 54 N.Y.2d 137, 140, 429 N.E.2d 400, 401, 444 N.Y.S.2d 893, 894 (1981)).

58. 191 A.D.3d 1393, 1394, 137 N.Y.S.3d 792, 793 (4th Dep't 2021).

59. *Id.* at 1394, 137 N.Y.S.3d at 792.

60. *Id.*

61. *Id.* at 1394, 137 N.Y.S.3d at 793.

62. *Id.*

the need to present further evidence.[63] The court then added that appellants did not make an offer of proof regarding what the testimony of the remaining potential witness, *i.e.*, the child's teacher, or any other allegedly unpresented testimony, would have established with respect to the limited issue of equitable estoppel they raised before the court.[64] Thus, the court held that "[w]e therefore perceive no basis to conclude that the court abused its discretion by terminating the hearing."[65] As the court's decision indicates, even if the appellants had objected to family court's ruling, that objection would not have been enough to preserve their argument in the absence of a proper offer of proof.[66]

The lesson to be learned from *Alex H.* is that whenever evidence is excluded, the party who sought to have the evidence admitted must make an offer of proof before the trial court of the substance of the excluded evidence so that the appellate court can determine whether any error in the exclusion of the evidence constitutes reversible error.[67] Failure to do so or to make a complete offer of proof will preclude a matter of law review of the claimed error.

C. Interest of Justice Review

Where an issue is not preserved for appellate review, the appellate division is empowered to review unpreserved arguments in both civil and criminal cases in the interest of justice.[68] A review of past case law where this interest of justice review power was sought shows that this power is used sparingly, especially in civil appeals involving evidentiary rulings.[69] Indeed, as this equivalent power is characterized by the federal courts in civil cases, it is fair to say that appellants in New York who seek to invoke this power "are like rich men who wish

63. *Alex H.*, 191 A.D.3d at 1394, 137 N.Y.S.3d at 793 (citing Serna v. Jones, 178 A.D.3d 1447, 1447, 112 N.Y.S.3d 649, 650 (4th Dep't 2019)).

64. *Id.*

65. *Id.*

66. *See id.*

67. *See* Guide to NY Evid rule 12.01, Preservation of Error for Appellate Review, at (5).

68. *See* Merrill v. Albany Med. Ctr. Hosp., 71 N.Y.2d 990, 991, 529 N.Y.S.2d 272, 273, 524 N.E.2d 873, 873, (1988); N.Y. CRIM. PROC. LAW § 470.15(3)(c) (McKinney 2021); *see also* Guide to NY Evid rule 12.01, Preservation of Error for Appellate Review, at (5).

69. *See* Evans v. New York City Transit Auth., 179 A.D.3d 105, 111, 113 N.Y.S.3d 127, 131 n.1 (2d Dep't 2019) (citing *Merrill*, 71 N.Y.2d at 991, 529 N.Y.S.2d at 273, 524 N.E.2d at 873); *see also* U.S. v. Krankel, 164 F.3d 1046, 1054 (7th Cir. 1998) (citing U.S. v. Pulido, 69 F.3d 192, 201 (7th Cir. 1995)).

to enter the Kingdom; their prospects compares with those of camels who wish to pass through the eye of a needle."[70]

Nonetheless, this power is invoked in civil actions as shown by the Appellate Division, Second Department decision in *Gubitosi v. Hyppolite*.[71] In this motor vehicle accident case, a trial on damages was held, following partial summary judgment to plaintiff on liability at which causation was in issue.[72] Plaintiff alleged injuries to his neck caused by the accident.[73] At the trial, it was revealed for the first time that plaintiff had injured his neck approximately a year and a half before the subject accident.[74] Defendants, however, did not lodge any protest to this revelation before the trial court.[75] The jury awarded plaintiff damages.[76] On appeal, defendants argued that plaintiff's failure to disclose his prior neck injury prejudiced them.[77] The Second Department, after acknowledging that defendants had failed to preserve this contention, invoked its interest of justice review power.[78] In its view, plaintiff's failure prejudiced the defendants as causation was a central issue in the damages trial and defendants had no opportunity to cross-examine plaintiff's expert about the prior injury because only the pre-recorded videotaped testimony of that expert was presented at trial.[79] They were in essence denied a fair trial, a denial that needed to be remedied.

While one might be tempted to conclude that the court's exercise of the interest of justice review power was an example of "I know it, when I see it" jurisprudence, such conclusion would be an unfair assessment. Rather, the court saw plaintiff's conduct as a fundamental error that resulted in an injustice to defendants.[80] In this regard, the Second Department was plainly cognizant that "[c]ourts of justice exist for the purpose of securing fair determination of controversies."[81] Perhaps that needle is wider than thought.

70. *Krankel*, 164 F.3d at 1054 (quoting *Pulido*, 69 F.3d at 201).
71. 188 A.D.3d 1015, 1016, 136 N.Y.S.3d 109, 112 (2d Dep't 2020).
72. *Id*. at 1015, 136 N.Y.S.3d at 111.
73. *See id*. at 1016, 136 N.Y.S.3d at 112.
74. *Id.*
75. *Id.*
76. *Gubitosi*, 188 A.D.3d at 1015, 136 N.Y.S.3d at 111.
77. *Id.* at 1016, 136 N.Y.S.3d at 112.
78. *Id.*
79. *Id.*
80. *See id.*
81. Nicholas v. Rosenthal, 283 A.D. 9, 13, 126 N.Y.S.2d 34, 37 (1st Dep't 1953).

II. EVIDENTIARY SHORTCUTS

A. Presumptions

New York common law recognizes the presumption of mailing under which a rebuttable presumption that a notice or other document was mailed to and received by the intended recipient arises "by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature."[82] In *CIT Bank North America v. Schiffman*, the Court of Appeals addressed the issue of evidentiary showing that must be made to rebut the presumption.[83] This issue was presented in the context of a section 1304 of the New York Real Property Actions and Proceedings (RPAPL) foreclosure notice.[84]

In *CIT Bank*, the assignee of a mortgage brought a foreclosure action in federal court against the defaulting borrowers.[85] Included was the plaintiff-lender's failure to comply with section 1304,[86] which required notices to the borrower ninety days before commencing the action, and RPAPL section 1306, mandated an electronic filing providing certain borrower information to the State Department of Financial Services as a condition precedent for bringing a suit.[87] Defendant's answer contained several affirmative defenses, including plaintiff-lender's failure to comply with those sections.[88] Plaintiff moved for summary judgment, contending that it had satisfied the section 1304 notice request by submitting its employee's affidavit, detailing CIT's routine office practice.[89] She attested to her personal knowledge of CIT's routine office practice relating to the generation, addressing, and mailing of ninety-day notices, and that envelopes for

82. CIT Bank N.A. v Schiffman 36 N.Y.3d 550, 556, 168 N.E.3d 1138, 1142, 145 N.Y.S.3d 1, 5 (2021); *see also in re* Claim of Gonzalez, 47 N.Y.2d 922, 923, 393 N.E.2d 482, 483, 419 N.Y.S.2d 488, 489 (1979) (citing 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)).

83. 36 N.Y.3d at 556, 168 N.E.3d at 1142, 145 N.Y.S.3d at 5.

84. *Id.* at 556, 168 N.E.3d at 1143, 145 N.Y.S.3d at 6; (citing N.Y. REAL PROP. ACTS LAW § 1304 (McKinney 2021)).

85. *Id.* at 553, 168 N.E.3d at 1140, 145 N.Y.S.3d at 3.

86. *Id.* at 554, 168 N.E.3d at 1141, 145 N.Y.S.3d at 4 (citing N.Y. REAL PROP. ACTS LAW § 1304 (McKinney 2021).

87. *Id.* (citing N.Y. REAL PROP. ACTS LAW § 1306 (McKinney 2021).

88. *CIT Bank*, 36 N.Y.3d at 554, 168 N.E.3d at 1141, 145 N.Y.S.3d at 4.

89. *Id.* at 553, 168 N.E.3d at 1140, 145 N.Y.S.3d at 3.

the ninety-day notices are "created upon default."[90] Plaintiff also submitted a copy of the electronic filing statement, which represented that the filing was done on the same day that the ninety-day notice was mailed.[91] In response, defendants claimed they never received the requisite notices and that since the notices were dated nearly one year after the default, plaintiff had deviated from its alleged routine procedure of generating envelopes "upon default."[92] Defendants also alleged the filing was deficient because it contained only the wife's name even though defendant was also a borrower.[93] The Second Circuit certified two questions to the Court of Appeals: (1) how a borrower can rebut a lender's proof of compliance with RPAPL section 1304 when that proof is in the form of a standard office mailing procedure; and (2) with respect to the RPAPL section 1306 filing, whether the statute requires the inclusion of information about each individual liable on the loan.[94]

With respect to the first question, the Court held initially that the presumption created by proof of the sender's routine business practice cannot be rebutted by mere denial of receipt.[95] Rather, "there must be proof of a material deviation from an aspect of the office procedure that would call into doubt whether the notice was properly mailed, impacting the likelihood of delivery to the intended recipient."[96] The Court added that minor deviations of little consequence are insufficient.[97] In the Court's view, it had created a workable rule that balances the practical considerations underpinning the presumption against the need to ensure the reliability of a routine office practice with respect to the creation and mailing of notices.[98]

Of note, Judge Eugene Fahey in a concurring opinion, in which Judges Leslie Stein and Rowan Wilson concurred, addressed the issue of what proof gives rise to the presumption in the first place.[99] He wrote: "For the presumption to arise, the standard office procedure 'must be geared so as to ensure the likelihood that [the document] is

90. *Id.* at 553–54, 168 N.E.3d at 1140–41, 145 N.Y.S.3d at 3–4.
91. *Id.* at 554, 168 N.E.3d at 1141, 145 N.Y.S.3d at 4.
92. *Id.*
93. *CIT Bank*, 36 N.Y.3d at 554, 168 N.E.3d at 1141, 145 N.Y.S.3d at 4.
94. *Id*. at 553, 168 N.E.3d at 1140, 145 N.Y.S.3d at 3.
95. *Id.* at 557, 168 N.E.3d at 1143, 145 N.Y.S.3d at 6.
96. *Id*.
97. *Id*.
98. *CIT Bank*, 36 N.Y.3d at 558, 168 N.E.3d at 1143, 145 N.Y.S.3d at 6.
99. *Id*. at 561, 563, 168 N.E.3d at 1146–47, 145 N.Y.S.3d at 9–10 (Fahey, J., concurring)

always properly addressed and mailed.'"[100] By example, testimony that an individual "always placed outgoing letters in a tray on his desk to be mailed" would be insufficient.[101] In contrast, an affidavit describing "how the notices in question were generated, addressed, and placed in envelopes; how those envelopes were transported to the mail room, posted and sealed; and then how the mail was regularly delivered to the nearby post office" would be sufficient to raise a presumption of mailing and receipt."[102]

CIT Bank is a thoughtful addition to the presumption of mailing jurisprudence. Both the majority and concurring opinions are decision of careful analysis for future litigation.

Another presumption addressed was the presumption created by section 388(1) of the Vehicle and Traffic Code, which makes every owner of a vehicle used in New York liable and responsible for injuries resulting from negligence "in the use or operation of such vehicle … by any person using or operating the same with the permission, express or implied, of such owner."[103] As construed by the Court of Appeals, section 388(1) gives rise to a presumption that a vehicle is operated with the owner's consent.[104]

This presumption, and specifically, the issue of rebutting it, was addressed by the Appellate Division, Fourth Department in *Holmes v. McCrea*.[105] Plaintiff commenced a personal injury action to recover for damages he sustained in a motor vehicle accident which occurred when he was a passenger in a car owned by defendant McCrea and operated by defendant Spencer, who later pleaded guilty to criminal

100. *Id.* at 561–62, 168 N.E.3d at 1146, 145 N.Y.S.3d at 9 (Fahey, J., concurring) (quoting Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 830, 386 N.E.2d 1085, 1086, 414 N.Y.S.2d 117, 118 (1978)).

101. *Id.* at 562, 168 N.E.3d at 1146, 145 N.Y.S.3d at 9 (Fahey, J., concurring) (citing Gardham & Son v. Batterson, 198 N.Y. 175, 178, 91 N.E. 371, 372 (1910)).

102. *Id.* at 562, 168 N.E.3d at 1147, 145 N.Y.S.3d at 10 (first citing Preferred Mut. Ins. Co. v. Donnelly, 22 N.Y.3d 1169, 1170, 8 N.E.3d 847, 848, 985 N.Y.S.2d 470, 471 (2014); then citing Badio v. Liberty Mut. Fire Ins. Co., 12 A.D.3d 229, 230, 785 N.Y.S.2d 52, 54 (1st Dep't 2004); and then citing Jonathan Woodner Co. v. Higgins, 179 A.D.2d 444, 445, 578 N.Y.S.2d 561, 562 (1st Dep't 1992)).

103. N.Y. VEH. & TRAF. LAW § 388(1) (McKinney 2021).

104. Leotta v. Plessinger, 8 N.Y.2d 449, 461, 171 N.E.3d 454, 459, 209 N.Y.S.2d 304, 312 (1960) (citing Wilson v. Harrington, 295 N.Y. 667, 668, 65 N.E.2d 101, 102 (1946); Saint Andrassy v. Mooney, 262 N.Y. 368, 371, 186 N.E. 867, 868 (1933)).

105. 186 A.D.3d 1043, 1044, 130 N.Y.S.3d 160, 161 (4th Dep't 2020).

possession of stolen property in the fifth degree[106] with respect to his use of the car at the time of the accident.[107] McCrea moved for summary judgment dismissing the complaint on the ground the Spencer did not have permission to operate his car, and thus liability under section 388(1) of the Vehicle and Traffic Code could not be imposed upon him.[108] In this regard, McCrea cited the presumption of consent was conclusively rebutted by Spencer's criminal conviction.[109] Plaintiff opposed the motion, arguing that the conviction could not be given collateral estoppel effect in the action, so as to rebut the presumption and that in any event a factual issue of consent was present because Spencer testified at his deposition that he had rented the car from McCrea.[110] The Fourth Department affirmed supreme court's granting of summary judgment.[111] While the court rejected McCrea's collateral estoppel argument, the court viewed the plea of guilty as an admission that he was not a permitted user of the car.[112] As to Spencer's "consent" testimony, the court rejected it as incredible as a matter of law in view of the owner's deposition testimony that Spencer had stolen the car, the police report indicating that McCrea had timely reported the car stolen, and Spencer's plea.[113]

B. Res Ipsa Loquitur

The doctrine of *res ipsa loquitur* permits an inference of negligence to be drawn solely from the happening of an accident upon the theory that "certain occurrences contain within themselves a sufficient basis for an inference of negligence."[114] The New York courts have consistently held the doctrine applies where the event in

106. N.Y. PENAL LAW § 165.40 (McKinney 2021).

107. *Holmes*, 186 A.D.3d at 1043–44, 130 N.Y.S.3d at 161.

108. *Id.* at 1044, 130 N.Y.S.3d at 161.

109. *Id.*

110. *Id.* at 1044, 130 N.Y.S.3d at 162–63.

111. *Id.* at 1044, 130 N.Y.S.3d at 161.

112. *Holmes*, 186 A.D.3d at 1044–45, 130 N.Y.S.3d at 161–62 (comparing Kemper Indep. Ins. Co. v. Ellis, 128 A.D.3d 1529, 1531–32, 8 N.Y.S.3d 770, 773 (4th Dep't 2015)).

113. *Id.* at 1044–45, 130 N.Y.S.3d at 162 (first citing Carthen v. Sherman, 169 A.D.3d 416, 417, 94 N.Y.S.3d 34, 34–35 (1st Dep't 2019); then citing *Kemper Indep. Ins. Co.*, 128 A.D.3d at 1531, 8 N.Y.S.3d at 773; and then citing Smith v. N.Y. Cent. Mut. Fire Ins. Co., 13 A.D.3d 686, 688, 785 N.Y.S.2d 776, 778 (3d Dep't 2004)).

114. George Foltis, Inc. v. City of New York, 287 N.Y. 108, 116, 38 N.E.2d 455, 460 (1941).

issue "(1) [is] of a kind which ordinarily does not occur in the absence of someone's negligence; (2) [is] caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) [is not] due to any voluntary action or contribution on the part of the plaintiff."[115] The doctrine was the subject of several appellate division decisions.[116]

In four decisions, plaintiffs sought to invoke the doctrine in medical malpractice actions. In this connection, the Court of Appeals has recognized that the doctrine applies in medical malpractice actions.[117] In *Christopher v. Atluri*, plaintiff alleged that his right shoulder was injured during a colonoscopy performed by the defendant physician and his surgical team, either because defendant negligently repositioned him, or allowed him to fall during the operation.[118] To defeat defendants' summary judgment motion, he invoked the doctrine.[119] The Appellate Division, Second Department held the doctrine was not applicable because plaintiff did not demonstrate that the injury was of a kind that ordinarily does not occur in the absence of negligence or that his injury was caused by an agency within defendant's exclusive control.[120] No expert testimony was offered by plaintiff on either of these two elements of the doctrine.[121]

On the other hand, the Appellate Division, Second Department held that the doctrine was properly invoked in *Smith v. Sommer*.[122] In *Smith*, plaintiff sought to recover damages for his gastroparesis allegedly resulting from the defendant surgeons' negligence in

115. Dermatossian v. New York City Transit Auth., 67 N.Y.2d 219, 226, 492 N.E.2d 1200, 1203, 501 N.Y.S.2d 784, 788 (1986) (quoting Corcoran v. Banner Super Market, Inc., 19 N.Y.2d 425, 430, 227 N.E.2d 304, 305, 280 N.Y.S.2d 385, 387 (1967)).

116. *See, e.g.*, Christopher v. Atluri, 189 A.D.3d 988, 989, 133 N.Y.S.3d 904, 905 (2d Dep't 2020); Smith v. Sommer, 189 A.D.3d 906, 908, 137 N.Y.S.3d 99, 103 (2d Dep't 2020); Young v. Sethi, 188 A.D.3d 1339, 1344, 134 N.Y.S.3d 571, 576 (3d Dep't 2020).

117. *See, e.g.*, Kambat v. Saint Francis Hosp., 89 N.Y.2d 489, 497, 678 N.E.2d 456, 460, 655 N.Y.S.2d 844, 848 (1947); States v. Lourdes Hosp., 100 N.Y.2d 208, 210, 792 N.E.2d 151, 152, 762 N.Y.S.2d 1, 2 (2003).

118. 189 A.D.3d at 989, 133 N.Y.S.3d at 905.

119. *Id.*

120. *Id.* at 990, 133 N.Y.S.3d at 905–06 (citing Pagano v. Cohen, 164 A.D.3d 516, 518, 82 N.Y.S.3d 492, 495 (2d Dep't 2018); McCarthy v. N. Westchester Hosp., 139 A.D.3d 825, 827, 33 N.Y.S.3d 77, 79 (2d Dep't 2016)).

121. *See id.* (mentioning no expert testimony).

122. 189 A.D.3d 906, 908, 137 N.Y.S.3d 99, 103 (2d Dep't 2020).

performing a fundoplication procedure.[123] The alleged negligence involved the defendants' failure to protect the vagus nerves during the procedure.[124] To invoke the doctrine, plaintiff presented expert testimony that in a first-time fundoplication procedure like the plaintiff's, injury to the vagus nerves should not occur if the surgeon follows proper surgical procedure.[125] The court held that the expert testimony was properly admitted to satisfy the doctrine's first element.[126] In so holding, the court cited substantial and well-settled precedent that expert testimony may be admitted to help the jury determine whether the injury would not ordinarily take place in the absence of negligence.[127]

The Appellate Division, Third Department in *Young v. Sethi*[128] and *Mattison v. Orthopedics New York, LLP*[129] addressed the doctrine's first element. In *Young*, plaintiff was not able to establish *prima facie* the first element, but plaintiff in *Mattison* was.

In *Young*, plaintiff alleged the defendant surgeons committed malpractice when they derotated her pelvis during interbody fusion surgery.[130] To defeat defendant's summary judgment motion, plaintiff, in the absence of evidence as to how the alleged derotation could have occurred as the result of negligence, sought to invoke the doctrine.[131] As to the doctrine's first element, plaintiff argued that the jury could consider that element based on their common experience.[132] The court rejected the argument, holding that there was nothing in the record to suggest that the jury was competent to "conclude from common experience that such things to not happen if there has been proper skill and care."[133] Rather, expert testimony was needed, and since plaintiff

123. *Id.* at 906–07, 137 N.Y.S.3d at 101–02 (gastroparesis is a form of stomach paralysis that impedes the ability to digest food.).

124. *Id.* at 908, 137 N.Y.S.3d at 103.

125. *Id.* at 909, 137 N.Y.S.3d at 103.

126. *Id.*

127. *Smith*, 189 A.D.3d at 909, 137 N.Y.S.3d at 103 (citing Bernard v. Bernstein, 126 A.D.3d 833, 835, 3 N.Y.S.3d 426, 428 (2d Dep't 2015)).

128. 188 A.D.3d 1339, 1339, 134 N.Y.S.3d 571, 571 (3d Dep't 2020).

129. 189 A.D.3d 2025, 2025, 137 N.Y.S.3d 814, 814 (3d Dep't 2020). The author was appellate counsel to plaintiff.

130. *Young*, 188 A.D.3d at 1340, 134 N.Y.S.3d at 572–73.

131. *See id.* at 1344, 134 N.Y.S.3d at 576 (citing Leone v. United Health Servs., 282 A.D.2d 860, 861, 723 N.Y.S.2d 260, 262 (3d Dep't 2001).

132. *See id.*

133. *Id.*

did not present any such testimony, she could not invoke the doctrine.[134]

In *Mattison*, plaintiff alleged that during a total knee replacement surgery, her sciatic nerve was injured during the surgery performed by the defendant surgeon and his surgical team.[135] On defendants' motion for summary judgment, they relied upon expert medical proof showing defendants were not negligent, and that plaintiff's expert in response was not able to identify how plaintiff's sciatic nerve was injured.[136] In opposition, plaintiff invoked the doctrine to raise an inference of defendants' negligence to defeat the motion.[137] In support, plaintiff's expert opined that a sciatic nerve injury was not a known risk of properly performed knee replacement surgery and that such an injury would not ordinarily occur in the absence of negligence.[138] The Third Department, after noting that whether sciatic nerve injury could occur in the absence of someone's negligence was not a matter that jurors would be competent to determine, held that plaintiff was required to submit expert proof to establish the first element; and that plaintiff's expert's affidavit was sufficient to satisfy *prima facie* the first element.[139] Plaintiff was thus found to have properly invoked the doctrine, thereby raising a question of fact as to defendant's negligence, which required denial of their summary judgment motion.[140]

134. *Id*. at 1343, 134 N.Y.S.3d at 575 (citing Calcagno v. Orthopedic Assocs. of Dutchess Cnty., PC, 148 A.D.3d 1279, 1280–81, 48 N.Y.S.3d 832, 834 (3d Dep't 2017)).

135. Mattison v. Orthopedics NY, LLP, 189 A.D.3d 2025, 2026, 137 N.Y.S.3d 814, 815 (3d Dep't 2020).

136. *Id.* at 2028, 137 N.Y.S.3d at 816.

137. *Id.* at 2027, 137 N.Y.S.3d at 815.

138. *Id.* at 2028, 137 N.Y.S.3d at 817.

139. *Id.* (first citing States v. Lourdes Hosp., 100 N.Y.2d 208, 213–14, 792 N.E.2d 151, 155, 762 N.Y.S.2d 1, 2 (2003); then citing Smith v. Sommer, 189 A.D.3d 906, 908–09, 137 N.Y.S.3d 99, 103 (2d Dep't 2020); and then citing Sklarova v. Coopersmith, 180 A.D.3d 510, 511, 119 N.Y.S.3d 101, 103 (1st Dep't 2020); and then citing Frank v. Smith, 127 A.D.3d 1301, 1302–03, 6 N.Y.S.3d 754, 757 (3d Dep't 2015); and then citing Bernard v. Bernstein, 126 A.D.3d 833, 835–36, 3 N.Y.S. 426, 428 (2d Dep't 2015)) (comparing James v. Wormuth, 21 N.Y.3d 540, 547, 997 N.E.2d 133, 137, 974 N.Y.S.2d 308, 312 (2013)).

140. *Mattison,* 189 A.D.3d at 2028, 2029, 137 N.Y.S.3d at 817, 818 (first citing *Lourdes Hosp*., 100 N.Y.2d at 213–14, 792 N.E.2d at 155; then citing *Smith*, 189 A.D.3d at 908–09, 137 N.Y.S.3d at 103; and then citing *Sklarova,* 180 A.D.3d at 511, 119 N.Y.S.3d at 103; and then citing *Frank*, 127 A.D.3d at 1302–03, 6

The Appellate Division, First Department addressed the doctrine's first element in several non-medical malpractice actions. In *Orea v. NH Hotels USA, Inc*., the court invoked the doctrine where plaintiff was injured in an elevator's free fall, concluding that an "elevator free fall does not ordinarily occur in the absence of negligence."[141] In *Townsend v. New York City Housing Authority*, the court held the doctrine was applicable where an electrical circuit box suddenly burst into flames, injuring plaintiff.[142] In *Nyambu v. Whole Foods Market Group, Inc*., the court held the doctrine was applicable where plaintiff was injured when part of defendant grocery store's exterior sign broke off, fell and struck her on the head as she was exiting the store as "there is nothing in the record to undermine 'common experience' that a sign above a store's entrance in New York City does not break and send pieces onto a passerby below in the absence of negligence."[143] In *Wenzel v. All City Remodeling, Inc*., the court rejected defendant's argument that the doctrine did not apply where plaintiff was injured when the ceiling in her apartment's bedroom collapsed upon her while she was sleeping, holding "[a] ceiling collapse does not ordinarily occur in the absence of negligence."[144]

N.Y.S.3d at 757; then citing *Bernard*, 126 A.D.3d at 835–36, 3 N.Y.S.3d at 428) (comparing *James*, 21 N.Y.3d at 547, 997 N.E.2d at 137, 974 N.Y.S.2d t 312).

141. 187 A.D.3d 476, 478, 133 N.Y.S.3d 252, 254 (1st Dep't 2020) (first citing Kleinberg v. City of New York, 61 A.D.3d 436, 438, 877 N.Y.S.2d 23, 25 (1st Dep't 2009); then citing Ruiz-Hernandez v. TPE NWI Gen., 106 A.D.3d 627, 628, 966 N.Y.S.2d 62, 64 (1st Dep't 2013)).

142. 187 A.D.3d 591, 591, 130 N.Y.S.3d 674, 674–75 (1st Dep't 2020) (first citing Ianotta v. Tishman Speyer Props., Inc., 46 A.D.3d 297, 298–99, 852 N.Y.S.2d 27, 28 (1st Dep't 2007); then citing Horowitz v. New York City. Hous. Auth., 188 A.D.2d 392, 392, 591 N.Y.S.2d 382, 383 (1st Dep't 1992)).

143. 191 A.D.3d 580, 582, 143 N.Y.S.3d 14, 18 (1st Dep't 2021) (first citing Wilkins v. W. Harlem Grp. Assistance, Inc., 167 A.D.3d 414, 415, 90 N.Y.S.3d 21, 22 (1st Dep't 2018); then citing Hallett v. Stanley Stores Cleaners & Dryers, 276 A.D. 386, 387, 94 N.Y.S.2d 622, 623 (1st Dep't 1950); and then citing Shapiro v. Art Strauss Sign Corp., 39 A.D.2d 696, 697, 332 N.Y.S.2d 588, 589 (1st Dep't 1972)).

144. 195 A.D.3d 496, 497, 145 N.Y.S.3d 342, 342 (1st Dep't 2021) (first citing Lisbey v. Pel Park Realty, 99 A.D.3d 637, 638, 952 N.Y.S.2d 882, 882 (1st Dep't 2012); then citing Mejia v. New York City Transit Auth., 291 A.D.2d 225, 227, 737 N.Y.S.2d 350, 353 (1st Dep't 2002)).

C. Missing Witness Adverse Inference

New York's missing witness charge allows the jury to draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events.[145] The charge rests on "the commonsense notion that the non-production of the evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause."[146] This charge was applied in an instructive decision by the Appellate Division, Third Department.

In *Warner v. Kain*, defendant Kyle Kain (Kain) was operating a car owned by defendant John Kain when Kyle Kain collided into the rear of a car stopped at a red light.[147] The collision forced the stopped car forward, resulting in a collision with the car in front of it, which was operated by plaintiff, Lowell Warner.[148] Plaintiff and his wife, derivatively, commenced an action to recover his claimed injuries.[149] At trial, plaintiffs' case relied primarily on Warner's testimony, medical records, and the expert testimony of Dr. Douglas Kirkpatrick, an orthopedic surgeon who conducted an independent medical examination (IME) of Warner.[150] At trial, plaintiffs, upon learning that defendants were not going to call Dr. Kaufman, an orthopedic surgeon who also conducted an IME on behalf of defendants, issued a subpoena for Dr. Kaufman to testify on their behalf.[151] When Dr. Kaufman failed to appear for trial, plaintiffs opted to seek a missing witness charge instead of seeking judicial enforcement of the subpoena.[152] The supreme court denied the request for the charge.[153]

The Third Department initially noted that plaintiffs, as the party requesting the charge were required to "promptly notify the court that there is an uncalled witness believed to be knowledgeable about a

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145. *See* DeVito v. Feliciano, 22 N.Y.3d 159, 165, 1 N.E.3d 791, 795, 978 N.Y.S.3d 717, 721 (2013) (quoting People v. Savinon, 100 N.Y.2d 192, 196, 791 N.E.2d 401, 403, 761 N.Y.S.2d 144, 146 (2003)).

146. People v. Gonzalez, 68 N.Y.2d 424, 427, 502 N.E.2d 583, 586, 509 N.Y.S.2d 796, 799 (1986) (citing Laffin v. Ryan, 4 A.D.2d 21, 25, 162 N.Y.S.2d 730, 735 (3d Dep't 1957)).

147. 186 A.D.3d 1844, 1844, 131 N.Y.S.3d 726, 728 (3d Dep't 2020).

148. *Id.*

149. *Id.*

150. *Id.* at 1845, 131 N.Y.S.3d at 729.

151. *Id.* at 1848, 131 N.Y.S.3d at 731.

152. *Warner*, 186 A.D.3d at 1848, 131 N.Y.S.3d at 731.

153. *Id.*

material issue pending in the case, that such witness can be expected to testify favorably to the opposing party and that such party has failed to call him [or her] to testify."[154] However, it questioned whether Dr. Kaufman was "missing" because defendants did not call him or because plaintiffs made the tactical decision not to pay his expert fee or otherwise seek enforcement of the subpoena.[155] The court further commented that since plaintiffs conceded that at least some aspects of Dr. Kaufman's IME report were favorable to defendants, such testimony was cumulative which would argue against giving the charge.[156] In view of these facts, and plaintiff's counsel's extensive comments in his closing arguments on Dr. Kaufman's absence, the court concluded supreme court did not abuse its discretion in denying plaintiff's request for the charge.[157]

The takeaway from *Warner* is clear. Not only will the failure to satisfy the preconditions for the giving of the charge preclude the giving of the charge, but counsel's true reason for not calling the purportedly "missing witness" may also lead to the denial of a request for the missing witness charge.

D. Spoliation Adverse Inference

Under New York's common law spoliation doctrine, a party may be sanctioned where it negligently lost or intentionally destroyed key evidence.[158] A trial court possess broad discretion to determine the nature of the sanction to be imposed for spoliation.[159] Numerous spoliation sanction opinions were issued discussing and applying the

154. *Id*. (quoting People v. Gonzalez, 68 N.Y.2d 424, 427, 502 N.E.2d 583, 586, 509 N.Y.S.2d 796, 799 (1986)) (citing Eagle Pet Serv. Co. v. Pac. Emps. Ins. Co., 175 A.D.2d 471, 473, 572 N.Y.S.2d 623, 625 (3d Dep't 1991)).

155. *Id.* (citing N.Y. C.P.L.R. 2308(a) (McKinney 2021)).

156. *Id.* (first comparing DeVito v. Feliciano, 22 N.Y.3d 159, 166, 1 N.E.3d 791, 796, 978 N.Y.S.3d 717, 722 (2013); and then comparing Leahy v. Allen, 221 A.D.2d 88, 92, 644 N.Y.S.2d 388, 391 (3d Dep't 1996)).

157. *Warner*, 186 A.D.3d at 1848, 131 N.Y.S.3d at 731.

158. *See* Pegasus Aviation I, Inc. v. Varig Logistica, S.A., 26 N.Y.3d 543, 547–48, 46 N.E.3d 601, 602, 26 N.Y.S.3d 218, 219 (2015) (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

159. *See id*. at 551, 46 N.E.3d at 605, 26 N.Y.S.3d at 222 (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. 3126.24 (McKinney 2021)).

elements for establishing spoliation and the sanctions available upon such finding.[160] Several are worth discussing.

Discussion starts with three decisions from the Appellate Division, Second Department addressing the doctrine's culpability element, *e.g.*, spoliation was the result of negligent or intentional conduct. In *Luzuriaga v. FDR Services Corp.*, defendants at plaintiff's deposition made an oral request on the record for the plaintiff to preserve 271 photographs on his cell phone that depicted his post-accident activities, and later made a written demand for these photographs.[161] Plaintiff produced 232 photographs from his cell phone and later admitted at a second deposition that the remaining photographs had been inadvertently erased from his cell phone after he lent it to his wife.[162] The defendants then moved for an adverse inference charge against the plaintiff for spoliation of the thirty-nine missing photographs, which motion was granted by Supreme Court.[163] The Second Department affirmed, finding that defendants had assumed an obligation to plaintiffs to preserve the photographs at the time of their destruction, and they negligently failed to do so.[164] This failure warranted the sanction of imposition of an adverse inference charge at trial.[165] The absence of any intent to frustrate discovery did not preclude the sanction.[166] Similarly, in *Oppenheimer v. City of New York*, the Second Department noted that the loss of a surveillance video depicting plaintiff's assault at a homeless shelter owned by defendant was spoliation of evidence even if defendant negligently failed to ensure its preservation.[167] The court noted that plaintiff's

160. *See, e.g.*, Luzuriaga v. FDR Serv. Corp., 189 A.D.3d 817, 817, 133 N.Y.S.3d 484, 484 (2d Dep't 2020); Oppenheimer v. City of New York, 193 A.D.3d 957, 957, 142 N.Y.S.3d 846, 846 (2d Dep't 2021); Loccisano v. Ascher, 195 A.D.3d 610, 610, 149 N.Y.S.3d 229, 229 (2d Dep't 2021).

161. 189 A.D.3d 817, 817, 133 N.Y.S.3d 484, 484 (2d Dep't 2020).

162. *Id.*

163. *Id.*

164. *Id.* at 818, 133 N.Y.S.3d at 485.

165. *Id.* (citing Squillacioti v. Indep. Grp. Home Living Program, Inc., 167 A.D.3d 673, 676, 90 N.Y.S.3d 51, 54 (2d Dep't 2018); then citing SM v. Plainedge Union Free Sch. Dist., 162 A.D.3d 814, 819, 79 N.Y.S.3d 215, 220 (2d Dep't 2018); and then citing Smith v. Cunningham, 154 A.D.3d 681, 683, 61 N.Y.S.3d 434, 437 (2d Dep't 2017)).

166. Luzuriaga v. FDR Servs. Corp., 189 A.D.3d 817, 818, 133 N.Y.S.3d 484, 485 (2d Dep't 2020) (quoting Delmur, Inc. v. Sch. Constr. Auth., 174 A.D.3d 784, 786, 106 N.Y.S.3d 146, 149 (2d Dep't 2019)).

167. 193 A.D.3d 957, 957–59, 142 N.Y.S.3d 846, 847–48 (2d Dep't 2021) (quoting Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d 543, 547, 46

attorney had met with a director of the organization that operated the shelter on behalf of defendant and advised him that a copy of the video in the possession of that director, which had been transferred to a USB drive, must be preserved.[168] The sanction for the negligent loss was that the defendant was prohibited from presenting any evidence to contradict the affidavit of a security guard who had viewed the video, a sanction which the court held provided "proportionate relief" to plaintiff.[169] In *Loccisano v. Ascher*, a medical malpractice action, the Second Department held the sanction of directing an adverse charge against defendant physicians at trial for their failure to produce fluoroscopic/ultrasound imaging from a venogram performed on plaintiff was proper.[170] The Court noted that as the defendants' regular practice was to record the results of venograms and defendants offered no explanation for the absence of the imaging, spoliation was established either because of defendants' negligence or their destruction of the imaging.[171]

The spoliation doctrine was addressed by the Appellate Division, First Department in the context of the replacement of a sidewalk which was the subject of the litigation in *Jerrick Associates, Inc. v. Phoenix Owners Corp*., where defendant partially replaced the sidewalk after its consultant inspected the sidewalk.[172] This occurred after its consultant inspected the sidewalk, but without providing notice to plaintiff that the sidewalk replacement was to commence, or an opportunity to plaintiff to have a sidewalk consultant conduct an inspection prior to the replacement.[173] The court did not address whether replacing the sidewalk may have been a proper remedial

N.E.3d 601, 602, 26 N.Y.S.3d 218, 219 (2015)) (citing Rokach v. Taback, 148 A.D.3d 1195, 1196, 50 N.Y.S.3d 499, 501 (2d Dep't 2017).

168. *Id.* at 957–58, 142 N.Y.S.3d at 847.

169. *Id.* at 958–59, 142 N.Y.S.3d at 847–48 (quoting *Pegasus Aviation*, 26 N.Y.3d at 551, 46 N.E.3d at 605, 26 N.Y.S.3d at 222) (first citing Heins v. Public Storage, 164 A.D.3d 881, 883, 83 N.Y.S.3d 199, 202 (2d Dep't 2018); and then citing *Rokach*, 148 A.D.3d at 1196, 50 N.Y.S.3d at 501).

170. 195 A.D.3d 610, 614, 149 N.Y.S.3d 229, 233–34 (2d Dep't 2021) (first citing Hughes v. Covey, 131 A.D.3d 581, 583, 15 N.Y.S.3d 195, 196–97 (2d Dep't 2015); then citing Gotto v. Eusebe-Carter, 69 A.D.3d 566, 567–68, 892 N.Y.S.2d 191, 193 (2d Dep't 2010).

171. *Id.* at 614, 149 N.Y.S.3d at 233 (first citing *Hughes*, 131 A.D.3d at 582–83, 15 N.Y.S.3d at 196; then citing *Gotto*, 69 A.D.3d at 567–68, 892 N.Y.S.2d at 193).

172. 191 A.D.3d 472, 472, 142 N.Y.S.3d 20, 21 (1st Dep't 2021) (citing Jimenez v. Weiner, 8 A.D.3d 133, 133–34, 779 N.Y.S.2d 23, 24 (1st Dep't 2004).

173. *Id.*

measure taken without intent to frustrate plaintiff's prosecution of its action, but nonetheless found defendant acted with a culpable state of mind, viewed as negligent or intentional.[174]

Supreme Court Justice Mark Masler addressed a claim of spoliation of electronically stored information (ESI) for emails in the context of deciding whether a litigation hold notice is discoverable in *Radiation Oncology Services of Central New York, P.C. v. Our Lady of Lourdes Memorial Hospital, Inc*.[175] Ordinarily, litigation hold notices are protected by the attorney-client privilege or as attorney work product.[176]

Plaintiff Dr. Michael Fallon, a radiologist, is the sole shareholder of plaintiff Radiation Oncology Services of Central New York, P.C. (ROSCNY).[177] ROSCNY was the exclusive provider of radiology oncology services at defendant hospital pursuant to a written agreement.[178] Subsequently, defendant terminated the agreement after it had suspended Fallon's clinical privileges but then restored them.[179]

In the ensuing litigation commenced against the hospital and several of its employees, defendants disclosed printed copies of emails its employees had sent or received involving Dr. Fallon.[180] However, the ESI for these emails was not provided as requested.[181] Plaintiffs then moved for sanctions based on the alleged spoliation of the ESI for seven emails.[182] They also moved for disclosure of defendants' litigation hold notices disseminated to and among defendants to support its sanctions request, contending that these notices would help them establish defendants' culpability in the apparent loss or destruction of the ESI.[183]

174. *Id.*

175. 69 Misc. 3d 209, 210, 126 N.Y.S.3d 873, 874 (Sup. Ct. Cortland Cnty. 2020).

176. *See*, *e.g.,* Muro v. Target Corp., 250 F.R.D. 350, 360 (N.D. Ill. 2007) *aff'd*, 580 F.3d 485 (7th Cir. 2009); United Illuminating Co. v. Whiting-Turner Contracting Co., 2020 U.S. Dist. LEXIS 202354, at *10–11 (D. Conn. 2020) (quoting Pearlstein v. Blackberry Ltd., 2019 U.S. Dist. LEXIS 45098, at *62 (S.D.N.Y. 2019)).

177. *Radiation Oncology*, 69 Misc. 3d at 210, 126 N.Y.S.3d at 874.

178. *Id.*

179. *Id.*

180. *Id.* at 211–12, 126 N.Y.S.3d at 875–876.

181. *Id.* at 212, 126 N.Y.S.3d at 876.

182. *Radiation Oncology*, 69 Misc. 3d at 210, 126 N.Y.S.3d at 874.

183. *Id*.

Justice Masler rejected defendants' argument that there has been no spoliation because hard copies of the emails had been produced, noting the emails associated ESI had not been provided as requested.[184] However, Justice Masler did not conclude spoliation was established because of the absence of sufficient proof as to defendants' culpability in the apparent loss or destruction of the ESI.[185] Production of the litigation hold notices would be of assistance in making that determination.[186] Justice Masler was aware that there was a potential bar to the disclosure of the notices due to the fact that the notices could be protected by either the attorney-client privilege or attorney work product doctrine.[187] Citing to substantial federal precedent, Judge Masler held that disclosure could nonetheless be ordered if a preliminary showing of spoliation was made by plaintiffs.[188] Based upon plaintiffs' proof of the destruction of the ESI associated with two emails previously disclosed, Judge Masler held plaintiffs made a preliminary showing of spoliation sufficient to compel production of defendants' litigation hold, which will afford the parties a full and fair opportunity to litigate the issue of spoliation sanctions.[189] Thus, plaintiffs' motion was granted to the extent of ordering defendants to produce the litigation hold and was otherwise held in abeyance.[190]

III. RELEVANCE AND ITS LIMITS

A. Habit

It is a venerable rule in New York, with limited exceptions, that evidence of a person's character is not admissible to prove that the person acted in conformity therewith on a particular occasion, a rule

184. *Id.* at 212, 126 N.Y.S.3d at 876 (citing Harry Weiss, Inc. v. Moskowitz, 106 A.D.3d 668, 669, 966 N.Y.S.2d 76, 77 (1st Dep't 2013), *abrogated by* Strong v. City of New York, 112 A.D.3d 15, 973 N.Y.S.2d 152 (1st Dep't 2013)).

185. *Id.* at 213, 126 N.Y.S.3d at 876–77.

186. *Id.*

187. *Radiation Oncology*, 69 Misc. 3d at 210, 126 N.Y.S.3d at 874 (citing Tracy v. NVR, Inc., No. 04-CV-6541L, 2012 U.S. Dist. LEXIS 44350, at *18 (W.D.N.Y. 2012); then citing Major Tours, Inc. v. Colorel, No. 05-3091, 2009 U.S. Dist. LEXIS 68128, at *6 (D.N.J. 2009); and then citing VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 48, 939 N.Y.S.2d 321, 332 (1st Dep't 2012)).

188. *Id.* at 211, 126 N.Y.S.3d at 875.

189. *Id.* at 213, 126 N.Y.S.3d at 876–77.

190. *Id.* at 213, 126 N.Y.S.3d at 877.

applicable in both civil and criminal actions.[191] On the other hand, New York law provides that evidence of a person's habit is admissible for such purpose.[192] Distinguishing between character and habit is thus important. In the two prior *Surveys*, appellate division decisions addressing what constitutes an admissible habit and the proof necessary to establish the claimed habit were discussed in depth.[193] Decisions from the Appellate Division, Second Department and the Appellate Division, Third Department in this *Survey* year further discussed these issues with instructive analyses.

In *Guido v. Fielding*, plaintiffs alleged that defendant physician failed to discover intraoperatively a perforated bowel caused during an open gastric back procedure.[194] Supreme Court granted defendant's motion for summary judgment relying on defendant's expert's opinion that defendant's treatment of plaintiff was proper in all respects and was in accordance with the standard of care.[195] The First Department in a comprehensive opinion authored by Justice Judith Gische reversed and denied the motion on the basis that the expert's opinion was not based on admissible evidence, and thus was incompetent evidence.[196]

The court noted that the expert's opinion was based primarily on the defendant's deposition testimony regarding his alleged custom and practice of examining a patient's bowel for perforations before he completed the procedure, and the defendant did not lay a proper foundation for that testimony as admissible habit evidence.[197]

191. *See* People v. Hudy, 73 N.Y.2d 40, 54–55, 535 N.E.2d 250, 258, 538 N.Y.S.2d 197, 205 (1988) (first citing People v. Lewis, 69 N.Y.2d 321, 325, 506 N.E.2d 915, 917, 514 N.Y.S.2d 205, 207 (1987); then citing People v. Ventimiglia, 52 N.Y.2d 350, 359, 420 N.E.2d 59, 62, 438 N.Y.S.2d 261, 264 (1981); and then citing People v. Santarelli, 49 N.Y.2d 241, 246, 401 N.E.2d 199, 203, 425 N.Y.S.2d 77, 81 (1980); and then citing People v. Allweiss, 48 N.Y.2d 40, 46–47, 396 N.E.2d 735, 738, 421 N.Y.S.2d 341, 344 (1979)); Guide to NY Evid rule 4.11, Character Evidence, at (1).

192. *See* Halloran v. Virginia Chems., Inc., 41 N.Y.2d 386, 389, 361 N.E.2d 991, 994, 393 N.Y.S.2d 341, 344 (1977); Guide to NY Evid rule 4.13, Habit.

193. Michael J. Hutter, *2018-2019 Survey of New York Law: Evidence*, 70 SYRACUSE L. REV. 357, 384 (2021) (citing Ortega v. Ting, 172 A.D.3d 1217, 1218, 102 N.Y.S.3d 110, 112 (2d Dep't 2019)); 2019-2020 Evidence Survey, *supra* note 7, at 153 (citing Benjamin v. City of New York, 178 A.D.3d 557, 558, 116 N.Y.S.3d 22, 24 (1st Dep't 2019)).

194. 190 A.D.3d 49, 54 134 N.Y.S.3d 34, 39 (1st Dep't 2020).

195. *Id.*

196. *Id.* at 54, 134 N.Y.S.3d at 39.

197. *Id.* at 54, 134 N.Y.S.3d at 38–39.

Specifically, the court held that testimony could not be viewed as establishing a habit because he failed to establish the practice of palpating the bowel for perforations was routinely done by him in his open bariatric and it did not vary from patient to patient.[198] In this regard, defendant did not testify or provide any other proof regarding the number of times he had followed such a procedure during the hundreds of bariatric surgeries he had performed.[199] The court further noted that his testimony was insufficient to establish an admissible habit as he did not describe the gastric back procedure as being routine.[200]

The Court then provided an alternative ground for denying the motion, a ground also based on the habit evidence rule. Even if an appropriate foundation had been laid, the motion should have been denied because evidence of habit only gives rise to an inference that the habit was adhered to on the occasion in question and is not conclusive proof of what the defendant did at that time.[201] The Court further stated:

> "Plaintiffs' bariatric expert observed that although [defendant] testified about how he usually performed LAP-Band surgeries, the doctor had no independent recollection of this patient who had previously undergone other abdominal surgeries. Although [defendant] testified how he would have checked a patient's bowel during the surgery to see whether there was any perforation and leakage of its contents, plaintiffs' expert observed there was no mention of this in Ms. Guido's intraoperative records as having been done. The fact that [defendant] usually inspects and palpates a patient's bowel does not conclusively prove that he did so on this occasion. There is an issue of fact whether the practice described by [defendant] was followed by him in this particular case, calling into question whether the perforation could have been discovered had the procedure been followed."[202]

198. *Id.*

199. *Guido*, 190 A.D.3d at 54, 134 N.Y.S.3d at 38.

200. *Id.*

201. *Id.* at 55, 134 N.Y.S.3d at 39 (first citing Halloran v. Virginia Chems., Inc., 41 N.Y.2d 386, 392, 361 N.E.2d 991, 995, 393 N.Y.S.2d 341, 346 (1977); and then citing Lindeman v. Slavin, 184 A.D.2d 910, 911, 585 N.Y.S.2d 568, 568 (3d Dep't 1992)).

202. *Id.*

Thus, according to the court habit evidence cannot be the basis for judgment as a matter of law; and even if it did, the motion could still be defeated by evidence giving rise to competing inferences.

In *Michalko v. DeLuccia*, plaintiff and his wife, suing derivatively, sued the cardiologist, Dr. DeLuccia, who treated plaintiff following two heart attacks, and the gastroenterologist, Dr. Mazza, who performed an elective colonoscopy.[203] He alleged Dr. DeLuccia was negligent in approving cessation of DAPT for the seven days prior to the colonoscopy; that both doctors were negligent in not directly consulting with each other prior to this decision; and that Dr. Mazza was negligent in instructing the plaintiff to remain off DAPT for 14 days after the procedure, and in his failure to discuss the discontinuation of DAPT with Dr. DeLuccia before giving the instruction.[204] At trial, the defendants introduced evidence of their "habit" relating to their course of treatment regarding patients they held in common who were on DAPT.[205] The trial court then charged the jury regarding that evidence, charging in substance PJI 1:71.[206] The jury returned a verdict in favor of both defendants.[207] The Third Department in a thoughtful opinion authored by Justice Molly Reynolds-Fitzgerald reversed, holding the habit evidence charge should not have been given, and that this error required a new trial.[208]

The Third Department initially held that habit charge should not have been given because habit is appropriately charged only when the inference it creates is necessary "to fill in evidentiary gaps."[209] Here, no such gap was present because it was undisputed that, with respect to the directive that [plaintiff] cease DAPT seven days prior to the surgery, [Dr. DeLuccia] was informed and agreed to same.[210] As to the postsurgical directive [Dr. Mazza] testified that he did not consult [Dr. DeLuccia], but rather made a unilateral determination that [plaintiff] should remain off DAPT for an additional 14 days.[211]

The Third Department also held that the course of treatment regarding patients defendants "held in common" that defendants

203. 187 A.D.3d 1365, 1366, 133 N.Y.S.3d 122, 124 (3d Dep't 2020).

204. *Id.*

205. *Michalko*, 187 A.D.3d at 1367, 133 N.Y.S.3d at 125.

206. *Id.* at 1366, 133 N.Y.S.3d at 125.

207. *Id.* at 1366, 133 N.Y.S.3d at 124.

208. *Id.* at 1367, 1369, 133 N.Y.S.3d at 125, 127.

209. *Id.* at 1367, 133 N.Y.S.3d at 125 (citing Martin v. Timmins, 178 A.D.3d 107, 109, 110 N.Y.S.3d 707, 710 (2d Dep't 2019)).

210. *Michalko*, 187 A.D.3d at 1367, 133 N.Y.S.3d at 125.

211. *Id.*

claimed was their habit did not rise to the level of an admissible habit.[212] It pointed out that neither Dr. DeLuccia nor Dr. Mazza had complete control, and they both testified that their decisions regarding temporary cessation of DAPT prior to or after a colonoscopy varied depending on the circumstances of each patient.[213] Thus, their testimony negated basic elements of an admissible habit.

Guido and *Michalko* provide further clarity regarding the admissibility of habit evidence in medical malpractice actions as well as other actions. Together with the decisions discussed in prior *Surveys*, they provide significant guidance into when habit evidence is admissible and how it can be used.[214]

B. Witness Background Evidence

Background evidence is evidence that "serves as background information about persons, subjects or things."[215] The New York state and federal courts specifically hold that evidence concerning personal information about a witness, whether a party or non-party, may be admissible as background evidence as an aid to determining the probative value of the witness' testimony, including gauging the credibility of the witness.[216] Thus, testimony about a witness' education, employment, credentials or past life experience may be admissible subject to the trial court's discretion.[217] In *Tardif v. City of New York*, the Second Circuit confronted an issue as to whether the trial court abused its discretion in its evidentiary rulings regarding personal information about the plaintiff which she offered on her direct case.[218]

Plaintiff was arrested as a result of her conduct during an Occupy Wall Street protest in New York City.[219] After her booking at a local

212. *Id.* (citing Galetta v. Galetta, 21 N.Y.3d 186, 197, 991 N.E.2d 684, 691, 969 N.Y.S.2d 826, 833 (2013)).

213. *Id.*

214. For further discussion of *Michalko*, see Thomas A. Moore & Matthew Gaier, *Custom and Practice Revisited*, 265 N.Y.L.J. 3 (2021).

215. WEINSTEIN'S FED. EVIDENCE, §401.04(4)(a) (2d ed. 2021).

216. *See* People v. Kozlowski, 11 N.Y.3d 223, 238, 898 N.E.2d 891, 900, 869 N.Y.S.2d 848, 857 (2008); *see also* U.S. v. Blackwell, 853 F.2d 86, 88 (2d Cir. 1988) (first citing MCCORMICK'S EVIDENCE §184 (Robert Mosteller et al. eds., 8th ed. 2020); then citing Gov't of Virgin Islands v. Grant, 775 F.2d 508, 511 (3d Cir. 1985)).

217. *Kozlowski,* 11 N.Y.3d at 238, 898 N.E.2d at 900, 869 N.Y.S.2d at 857.

218. 991 F.3d 394, 408 (2d Cir. 2021).

219. *Id.*

precinct, her medication for treatment of her epilepsy was seized and placed in the custody of the police.[220] When the time to take the medication approached, plaintiff asked for her medication but police officers did not respond to the request.[221] Subsequently, plaintiff lost consciousness and collapsed.[222] Plaintiff was hospitalized, but then released on her own recognizance.[223] At another protest a few days later, plaintiff was involved in an altercation with police officers.[224] Plaintiff commenced an action in federal court alleging that the City violated the Americans with Disabilities Act of 1990 (ADA) in failing to reasonably accommodate her epilepsy by timely administering her medication while she was in custody and that the two police officers committed assault and battery by the use of force against her.[225] The district court granted summary judgment to the City on her ADA claim,[226] and following a trial a jury returned a verdict in favor of the City and the police officers on all of the remaining claims.[227]

On appeal, plaintiff argued, among other arguments, that the district court erred in limiting testimony regarding her personal background.[228] This issue arose in the context of defense counsel's statement in his opening that plaintiff was "inventing and exaggerating" the events surrounding each of her claims at trial and that she wanted the jury to give her money for those inventions and exaggerations.[229]

During plaintiff's direct examination, in addition to other background testimony regarding her involvement in the Occupy Wall Street movement, her counsel attempted to elicit testimony regarding the fact that she was adopted from Peru, worked as a sign-language interpreter for hearing impaired children[230] and that she had adopted two children from Honduras who were refugees.[231] Following multiple sustained objections by defense counsel, the district court at side bar instructed her counsel that it did not want him to elicit

220. *Id.*
221. *Id.* at 399.
222. *Id.*
223. *Tardif*, 991 F.3d at 401.
224. *Id.*
225. *Id.* at 397.
226. *Id.* at 402.
227. *Id.* at 402–03.
228. *Tardif,* 991 F.3d at 408.
229. *Id.*
230. *Id.*
231. *Id.*

anything that plays upon the sympathy of jurors, but instead "to get right to the heart of matters."[232]

The Second Circuit held the ruling was appropriate, noting that a witness/party's "background" is generally admissible and may provide context to a witness's substantive testimony and that district courts have "wide discretion concerning the admissibility of background evidence."[233] After noting the trial court allowed plaintiff to testify about her present activities and why she brought the action,[234] the court held that the probative value of the excluded evidence was substantially outweighed by the danger of unfair prejudice to the defendants because of the likely creation of juror sympathy and the additional time necessary to explore that background, especially where there has been "so much wasted time from plaintiff's side."[235]

It has been noted that the jurisprudence of "background evidence is essentially undeveloped.[236] That observation is true. *Tardif* may lead to future changes as to that status, with attorneys now aware of this rule of governing background evidence and its admissible purposes by reason of *Tardif*.

C. Molineux

Under New York's *Molineux* rule, evidence of crimes or wrongs committed by a person is admissible only upon a showing that it is more probative than prejudicial to prove an issue other than criminal propensity.[237] Of the numerous decisions applying this rule, four are noteworthy.

In *People v. Faulk*, defendant was charged with burglary in the second degree arising from an incident that occurred at a residence.[238] He was arrested one mile from the residence, surrounded by complainant and several other men, when complainant told the officer

232. *Id.*

233. *Tardif,* 991 F.3d at 409 (quoting United States v. Blackwell, 853 F.2d 86, 88 (2d Cir. 1988)).

234. *Id.* The court indirectly held that evidence about plaintiff's involvement in the Occupy Wall Street protest movement was properly admitted.

235. *Id.*

236. Gov't of Virgin Islands v. Grant, 775 F.2d 508, 513 (3d Cir. 1985).

237. *See* People v. Molineux, 168 N.Y 264, 293–318, 61 N.E. 286, 293–304 (1901); *see also* Guide to NY Evid rule 4.21, Evidence of Crimes and Wrongs, at (1).

238. 185 A.D.3d 953, 954, 128 N.Y.S.3d 43, 45 (2d Dep't 2020).

"they just caught somebody trying to break into one of the houses."[239] The officer than ran a warrant check on defendant's name, which revealed that there was an outstanding warrant for defendant for a parole violation. Defendant was then arrested, and when searched, a gold necklace was found in defendant's pants.[240] At defendant's trial, the People were permitted to elicit testimony from the arresting officer regarding defendant's parole violation warrant.[241]

The Appellate Division, Second Department held the evidence was properly admitted.[242] The basis for its holding was that the three essential elements for admissibility of this *Molineux* evidence were established.[243] First, the arresting officer's testimony that there was an outstanding warrant for the defendant's arrest for a parole violation was relevant to complete the narrative regarding the reason why the defendant was placed under arrest before any investigation into the burglary had taken place and thus had a legitimate non-propensity purpose.[244] Second, the probative value of the evidence outweighed its potential for undue prejudice to the defendant.[245] Third, the trial court provided the jury with appropriate limiting instructions immediately after the challenged testimony was elicited that the evidence must not be considered for the purpose that the defendant had a propensity or predisposition to commit the crime charged in the case.[246]

In *People v. Rodriguez*, the Appellate Division, First Department addressed the trial court's *Molineux* ruling in a burglary prosecution that permitted the People to introduce evidence related to two, of four, prior residential burglaries defendant had committed on the issue of defendant's intent.[247] While finding the two burglaries were probative on the issue of defendant's intent as defendant when arrested was on

239. *Id.*

240. *Id.*

241. *Id.* at 958, 128 N.Y.S.3d at 48.

242. *Id.*

243. *Faulk*, 185 A.D.3d at 958, 128 N.Y.S.3d at 48.

244. *Id.* (first citing People v. Henry, 173 A.D.3d 900, 901, 102 N.Y.S.3d 662, 664 (2d Dep't 2019); then citing People v. Springs, 156 A.D.3d 914, 914, 65 N.Y.S.3d 784, 784 (2d Dep't 2017); and then citing People v. Johnson, 45 A.D.3d 606, 606, 845 N.Y.S.2d 400, 401 (2d Dep't 2007); and then citing People v. Campbell, 7 A.D.3d 409, 410, 777 N.Y.S.2d 435, 436 (1st Dep't 2004)).

245. *Id.* (first citing *Henry*, 173 A.D.3d at 901, 102 N.Y.S.3d at 644; then citing People v. Hankerson, 165 A.D.3d 1285, 1287, 86 N.Y.S.3d 146, 149 (2d Dep't 2018); and then citing *Springs*, 156 A.D.3d at 914, 65 N.Y.S.3d at 784)).

246. *Id.* (quoting *Johnson*, 45 A.D.3d at 606, 845 N.Y.S.2d at 401).

247. 193 A.D.3d 554, 555, 146 N.Y.S.3d 123, 125 (1st Dep't 2021).

complainant's apartment's fire escape, claiming he was there to smoke, the court held the People's extensive proof of those burglaries which included a surveillance video, testimony from witnesses, and photographs were unnecessary and went well beyond that required to demonstrate intent.[248] In its view, the probative value of this extensive evidence did not outweigh its prejudicial effect to defendant, and the limiting instructions were insufficient to minimize that prejudicial effect.[249] Thus, error was present which resulted in a reversal of defendant's conviction.[250] The lesson here is clear. Too much is too prejudicial.

In *People v. Baez*, "defendant was charged with violating orders of protection that required him to avoid a former girlfriend, and with stabbing her adult son in the course of burglarizing the apartment building in which both the girlfriend and son lived in May 2016."[251] The Appellate Division, First Department held the trial court properly admitted abusive text messages and voicemails from defendant to the woman in April 2015 in which he insulted her and threatened to use violence against her and her children.[252] In its view, this evidence was properly admitted "to provide background on the relationship, to place the charged events in a more believable context, and to establish defendant's motive and intent to harm the son."[253] The court added that "the messages were highly relevant notwithstanding the passage of a year."[254] Lastly, the court noted the trial court's "thorough limiting instructions minimized any undue prejudice."[255] The lesson here is clear, namely, when evidence is admitted under *Molineu*x, a limiting instruction should always accompany the evidence, and the stronger the warning not to use the evidence for propensity purposes, the better.

Lastly, the Appellate Division, Fourth Department in *People v. Harlow* reminded the bench and bar that *Molineux* evidence which meets its non-propensity evidence must still be presented in

248. *Id*. at 556, 146 N.Y.S.3d at 125–26.

249. *Id*.

250. *Id*. (citing People v. Crimmins, 36 N.Y.2d 230, 241, 326 N.E.2d 787, 793, 367 N.Y.S.2d 213, 221 (1975)).

251. 187 A.D.3d 610, 611, 131 N.Y.S.3d 127, 127 (1st Dep't 2020).

252. *Id.*

253. *Id.* (first citing People v. Dorm, 12 N.Y.3d 16, 19, 903 N.E.2d 263, 264, 874 N.Y.S.2d 866, 867 (2009); then citing People v. Rodriguez, 180 A.D.3d 415, 416, 119 N.Y.S.3d 89, 91 (1st Dep't 2020)).

254. *Id.*

255. *Id*. 131 N.Y.S.3d at 127–28 (citing *Dorm*, 12 N.Y.3d at 19, 903 N.E.2d at 264, 874 N.Y.S.2d at 867).

admissible form.[256] In this prosecution charging defendant with the crime of "reckless endangerment in the second degree . . . arising from an incident in which a gun was fired from a moving vehicle."[257] The People were permitted to elicit testimony from police officers regarding what they had heard from others about defendant's involvement in the shooting. The basis for its admission was that it was admissible under *Molineux* to complete the narrative with background information.[258] The Fourth Department held the evidence was not admissible, "reiterate[ing] that 'there is no *Molineux* exception to the rule against hearsay.'"[259] The court's decision made the point that while a witness could testify that he or she witnessed defendant with a gun or heard defendant say he had a gun, which testimony would be admissible under *Molineux* as proper background to complete the narrative, which evidence is not hearsay, it would be hearsay for a witness to testify that someone else told him or her that defendant had a gun, which is hearsay.

D. Insurance

New York law is well settled that evidence as to whether a person is or is not insured against liability is inadmissible, and if admitted, reversible error will ordinarily be present.[260] However, a mere passing reference to insurance will not necessarily result in reversal.[261] In *Campbell v. Saint Barnabas*, the Appellate Division, First Department was asked to determine whether New York's rule was violated.[262]

Plaintiff, a home health aide, was injured when she tripped over a step stool at a physical therapy clinic she had taken her client to for an appointment.[263] At trial, during the questioning of plaintiff's doctor by plaintiff's attorney, he was asked "are you aware that [plaintiff]

256. 195 A.D.3d 1505, 1507–08, 148 N.Y.S.3d 593, 597 (4th Dep't 2021).

257. *Id.* at 1506, 148 N.Y.S.3d at 595.

258. *Id.* at 1507, 148 N.Y.S.3d at 597.

259. *Id.* at 1507–08, 148 N.Y.S. 3d at 597 (quoting People v. Meadow, 140 A.D.3d 1596, 1599, 33 N.Y.S.3d 597, 600–01 (4th Dep't 2016)).

260. *See* Salm v. Moses, 13 N.Y.3d 816, 817, 918 N.E.2d 897, 897, 890 N.Y.S.2d 385, 385 (2009) (first citing Leotta v. Plessinger, 8 N.Y.2d 449, 461, 171 N.E.2d 454, 460, 209 N.Y.S.2d 304, 313 (1960); then citing Simpson v. Found. Co., 201 N.Y. 479, 490, 95 N.E. 10, 15 (1911)); Guide to NY Evid rule 4.15, Liability Insurance.

261. Kish v. Bd. of Educ., 76 N.Y.2d 379, 383, 558 N.E.2d 1159, 1161, 559 N.Y.S.2d 687, 689 (1990).

262. *See* 195 A.D.3d 405, 408, 150 N.Y.S.3d 63, 66 (1st Dep't 2021).

263. *Id.* at 405–06, 150 N.Y.S.3d at 64–65.

was examined by a Dr. Buckner, who will come in here to testify tomorrow, under the guise of an independent medical examination?"[264] Plaintiff's doctor answered affirmatively, and then stated that such doctors are "generally paid by an insurance company."[265] Defense counsel objected and requested a curative instruction.[266] The trial court denied the request, and asked the doctor if he knew the answer to the question that had been posed.[267] The doctor testified that such medical experts are "generally hired by an outside agency" and that they are "not involved in the day to day care or the week to week or month to month care. They're hired solely for an opinion based on [a] bunch [of] records and an examination . . . That's how they're hired."[268] Subsequently, plaintiff's counsel was permitted to continue with the direct examination of the witness who went on to state that "'these doctors' opinions have nothing to do with diagnosis and treatment."[269] The following day defendant's counsel requested a mistrial, which the trial court promptly denied.[270]

The First Department had no trouble in finding that New York's rule prohibiting reference to a party's insurance coverage was violated by the doctor's testimony and constituted reversible error.[271] The Court surely got it right as the doctor's testimony could not be viewed as the "mere passing reference" of insurance. Indeed, the testimony could be properly viewed as a deliberate means to inform the jury of the defendant's insured status.

IV. PRIVILEGE

A. Attorney-Client Privilege

New York's attorney-client privilege may be invoked to preclude disclosure of a claimed confidential communication if the communication was "made between the attorney or his or her

264. *Id.* at 408, 150 N.Y.S.3d at 66 (internal quotation marks omitted).
265. *Id.*
266. *Id.*
267. *Campbell*, 195 A.D.3d at 408, 150 N.Y.S.3d at 66.
268. *Id.*
269. *Id.*
270. *Id.*

271. *Id.* at 408, 150 N.Y.S.3d at 66–67 (first citing Constable v. Matie, 199 A.D.2d 1004, 1005, 608 N.Y.S.2d 10, 11 (4th Dep't 1993); then citing Vassura v. Taylor, 117 A.D.2d 798, 799, 499 N.Y.S.2d 120, 121 (2d Dep't 1986)).

employee and the client in the course of professional employment."[272] Thus, a confidential communication to be protected by the privilege must originate from a person who may make privileged communications, and be addressed to persons who may receive them, *e.g.,* the client and the client's attorney, or their agents, so called "privileged persons."[273] The privilege does not extend to a communication between a privileged person and a non-privileged person or between non-privileged persons, even if the communication relates to the attorney's representation of the client.[274] In *Frank v. Morgans Hotel Group Management LLC*, the issue presented was whether the privilege could ever encompass communications between a client's attorney and an independent contractor or consultant.[275] Justice Gerald Lebovitz in a thoughtful decision answered affirmatively when that person is a "functional equivalent" of an employee of client.[276]

Frank arose from a deposition dispute in a personal-injury action in which plaintiff alleged that while a patron at a bar at a hotel owned and operated by defendants (Morgans) she fell due to unsafe conditions on the premises.[277] In the pre-trial stage of the action, the Morgans produced Steven Benjamin, a non-party, for deposition as a person with knowledge.[278] Benjamin had been employed by the Morgans as its director of risk management from 2007-2018.[279] However, his position was eliminated in 2018, but he had been immediately retained as a consultant on a contract basis to perform many of the same duties, retaining the title of director of risk management.[280]

In his current capacity, Benjamin retained responsibility for performing significant corporate functions, including managing Morgans' insurance programs nationwide, and working with Morgans' financial staff regarding insurance-related budget and loss forecasting issues.[281] He also had substantial decision-making

272. N.Y. C.P.L.R. 4503(a) (McKinney 2021).

273. MICHAEL M. MARTIN ET AL., NEW YORK EVIDENCE HANDBOOK 314–17 (2d ed. 2003).

274. *Id.* at 315–16.

275. 66 Misc. 3d 770, 772, 116 N.Y.S.3d 889, 891 (Sup. Ct. N.Y. Cnty. 2020).

276. *Id.* at 774, 116 N.Y.S.3d at 892.

277. *Id.* at 771, 116 N.Y.S.3d at 890–91.

278. *Id.* at 771, 116 N.Y.S.3d at 891.

279. *Id.* at 774, 116 N.Y.S.3d at 892.

280. *Frank*, 66 Misc. 3d at 774, 116 N.Y.S.3d at 892–93.

281. *Id.* at 774, 116 N.Y.S.3d at 893.

authority, including the assignment of defense counsel to represent Morgans in actions brought against them, and to make settlement offers within certain insurance policy limits.[282] Benjamin also reported directly to Morgans' general counsel and had a direct line of communication with Morgans' chief operating officer.[283]

During Benjamin's deposition, plaintiff's attorney sought to question him about, among other things, (1) communications between Benjamin and Morgans' counsel, and (2) a conversation that Benjamin had with another Morgans' employee in a three-way conference call among Benjamin, the employee and Morgans' counsel.[284] Counsel for Morgans objected and directed Benjamin not to answer these questions, asserting, in essence, that Benjamin was the "functional equivalent" of an employee for purposes of the privilege, and thus the communications were between privileged persons, and thus within the privilege.[285]

Judge Lebovitz invoked the emerging "functional equivalent" doctrine as argued by Morgans. Under this doctrine, "[c]ommunications between a company's lawyers and its independent contractors merit [attorney-client privilege] protection if, by virtue of assuming the functions and duties of [a] full-time employee, the contractor is a *de facto* employee of the company."[286] As explained by Judge Lebovitz, the doctrine inquires "whether a consultant or other contractor has in practice 'assum[ed] the functions and duties of [a] full-time employee' and has been 'so thoroughly integrated' into the corporation's structure that he or she 'is a *de facto* employee of the company.'"[287]Among the factors bearing upon the existence of a sufficient corporate-agent relationship are the extent to which the consultant has "primary responsibility" for a key corporate job, the agent works "continuously and closely" with the company principals "on matters critical to the company's position in litigation," and the

282. *Id.* at 775, 116 N.Y.S.3d at 893.

283. *Id.*

284. *Id.* at 771, 116 N.Y.S.3d at 891.

285. *Frank*, 66 Misc. 3d at 771–72, 116 N.Y.S.3d at 891.

286. Narayanan v. Sutherland Glob. Holdings Inc., 285 F. Supp. 3d 604, 615 (W.D.N.Y. 2018) (quoting Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 (S.D.N.Y. 2005)).

287. *Frank*, 66 Misc. 3d at 773, 116 N.Y.S.3d at 892 (first citing *Asia Pulp & Paper*, 232 F.R.D. at 113; then citing Viacom, Inc. v. Sumitomo Corp., 200 F.R.D. 213, 219 (S.D.N.Y 2001)).

consultant likely possesses information unknown to others in the company.[288]

Employing these factors, Judge Lebovitz found the doctrine applicable, and thus the privilege as well.[289] He noted Benjamin has previously held the corporate position of director of risk management, and when his position was eliminated, the company took him on as a full-time consultant with the same title and responsible for the same key corporate functions.[290] These functions included sole management of and decision-making about all insurance-related programs of the company (negotiation of policies for the company, budgeting and loss-financing, assigning defense counsel in suits against the company and making settlement offers in such suits, and reporting directly to corporate counsel and the company's Chief Operating Officer).[291] In such circumstances, treating the consultant as an independent third party for privilege purposes "would exalt form over substance."[292]

Frank is an important decision, as it provides guidance as to when the privilege can extend beyond current employees of the client to former employees now working as consultants who possess knowledge that will aid the client's attorney in representing the client in matters that arise after the employee left the employ of the client. To maximize the application of the "functional equivalent" doctrine, the functions and duties of the consultant need to be spelled out in detail, including that such duties involve decision making. Of note, *Frank* leaves unresolved the issue of the application of the privilege to former employees with whom the client has no ongoing relationship and the privileged status of communications with ex-employees as to matters that have occurred both during and after the employment. Present New York law does not provide definitive answers to that issue.[293]

288. *Id.* at 773–74, 116 N.Y.S.3d at 892 (quoting *Asia Pulp & Paper*, 232 F.R.D. at 113) (citing William Tell Servs., LLC v. Cap. Fin. Plan., LLC, 46 Misc. 3d 577, 582, 999 N.Y.S.2d 327, 332 (Sup. Ct. Rensselaer Cnty, 2014); and then citing Mt. McKinley Ins. Co. v. Corning Inc., 2017 No. 30704(U), slip op. at *18–20 (Sup. Ct. N.Y. Cnty. Apr. 17, 2017)).

289. *Id.* at 774–75, 116 N.Y.S.3d at 892–93 (quoting *Asia Pulp & Paper,* 232 F.R.D. at 113–14).

290. *Id.* at 774, 116 N.Y.S.3d at 893.

291. *Id.* at 775, 116 N.Y.S.3d at 893.

292. *Frank,* 66 Misc. 3d at 775, 116 N.Y.S.3d at 893.

293. *See* Michael J. Hutter*, The Attorney-Client Privilege and Its Application to Communications with Former Corporate Employees*, 23 N.Y. BUS. L. J., Summer 2019, at 25, 26.

New York's law recognizes that an "at issue" waiver of the attorney-client privilege occurs "where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a decision or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information."[294] This waiver rule was addressed, albeit briefly, in three Appellate Division, First Department decisions in which the rule's "affirmatively placed" requirement was emphasized as the *sine qua non* for an at issue waiver to be present. In *Alekna v. 207-217 West 110 Portfolio Owner, LLC*, the court noted that the contents of a privileged communication are not placed in issue merely because the information is relevant to the issues the parties are litigating.[295] In *Securitized Asset Funding 2011-2, Ltd. v. Canadian Imperial Bank of Commerce*, the court held a party's disavowal of any intention to use privileged documents to prove a relevant defense or claim precludes a finding of an "at issue" waiver.[296] In *Alterra American Insurance Co. v. National Football League*, the court held that in this coverage action the National Football League did not affect an "at issue" waiver of the privilege as attached to certain defense and settlement materials in the underlying action merely because it sought coverage in the litigation.[297]

The Appellate Division, First Department also addressed New York's waiver of the privilege by the inadvertent disclosure of otherwise privileged documents in *Enterprise Architectural Sales, Inc. v. Magnetic Builders Groups LLC*.[298] When there is an inadvertent

294. Deutsche Bank Tr. Co. of Ams. v. Tri-Links Inv. Tr., 43 A.D.3d 56, 63–64, 837 N.Y.S.3d 15, 23 (1st Dep't 2007) (citing Credit Suisse First Boston v. Utrecht-Am. Fin. Co., 27 A.D.3d 253, 254, 811 N.Y.S.3d 32, 32–33 (1st Dep't 2006)).

295. 188 A.D.3d 553, 554, 132 N.Y.S.3d 632, 633 (1st Dep't 2020) (first citing *Deutsche Bank Tr. Co.*, 43 A.D.3d at 64, 837 N.Y.S.2d at 23; then citing Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld, LLP, 52 A.D.3d 370, 374, 860 N.Y.S.2d 78, 82 (1st Dep't 2008)).

296. 191 A.D.3d 486, 487, 138 N.Y.S.3d 309, 309–10 (1st Dep't 2021).

297. 191 A.D.3d 496, 496, 138 N.Y.S.3d 328, 329 (1st Dep't 2021).

298. 193 A.D.3d 411, 412, 141 N.Y.S.3d 691, 692 (1st Dep't 2021) (first citing Mfrs. & Traders Tr. Co. v. Servotronics, Inc., 132 A.D.2d 392, 398–99, 522 N.Y.S.2d 999, 1004 (4th Dep't 1987); then citing John Blair Commc'ns, Inc. v. Reliance Cap. Grp. L.P., 182 A.D.2d 578, 579, 582 N.Y.S.2d 720, 721 (1st Dep't 1992); and then citing Campbell v. Aerospace Prods. Int'l., 37 A.D.3d 1156, 1157, 830 N.Y.S.2d 416, 417 (4th Dep't 2007)).

disclosure, the privilege will be lost unless the would-be privilege holder establishes that reasonable precautions had been taken to prevent the disclosure; prompt action was undertaken to invoke the privilege and retrieve the document upon discovery of the disclosure; and the party in possession of the documents will not suffer undue prejudice.[299] In *Enterprise*, the First Department found that the first two elements were established and then turned its attention to the third element.[300] The court emphasized the relevance of the document to the merits of the action does not automatically allow the recipient to have unbridled use of it.[301] Rather, the "proper inquiry is whether the act of restoring immunity to an inadvertently disclosed document would be unfair to the party in receipt of the material under the facts of each case."[302]

B. Family Privilege

New York has two family privilege rules codified in CPLR 4502.[303] CPLR 4502(a) applies "in an action founded on adultery" and makes one spouse incompetent to testify against the other "except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense;"[304] and CPLR 4502(b) provides that a spouse "shall not be required, or, without consent of the other, if living, allowed, to disclose a confidential communication made by one to the other during marriage."[305] As can be seen, CPLR 4502(a) sets forth a narrow rule of incompetence in matrimonial actions, and CPLR 4502(b) sets forth a privilege for confidential communications between spouses.[306] In *Agulnick v. Agulnick*, the Appellate Division, Second Department addressed CPLR 4502(a).[307]

In this matrimonial action, plaintiff husband sought a divorce on the sole ground of an irretrievable breakdown of the marriage, and

299. MARTIN ET. AL., *supra* note 273, at 298–99.
300. *Enterprise*, 193 A.D.3d at 411, 141 N.Y.S.3d at 692.
301. *Id.*
302. *Id.*
303. *See* N.Y. C.P.L.R. 4502 (McKinney 2021); *see also* MARTIN ET. AL., *supra* note 273, at 370–72.
304. N.Y. C.P.L.R. 4502(a) (McKinney 2021).
305. *Id.* at 4502(b).
306. *Id.* at 4502.
307. 191 A.D.3d 12, 23, 136 N.Y.S.3d 462, 471–72 (2d Dep't 2020) (first citing N.Y. DOM. REL. LAW § 170(7) (McKinney 2021); then citing N.Y. DOM. REL. LAW § 170(4)).

wife filed a counterclaim seeking a divorce on the ground of adultery.[308] She alleged that plaintiff had engaged in an adulterous relationship with the family babysitter.[309] Plaintiff moved for summary judgment.[310] In support of his motion, he submitted his affidavit and an affidavit of the babysitter, both denying a sexual relationship of any kind or nature.[311] The affidavits contained specific averments which, read together, corroborated each other and satisfied plaintiff's *prima facie* burden.[312] In opposition, defendant provided no dates, described no suspicious circumstance with any detail or particularity, identified no particular relevant social event, and identified no witness who observed conduct or heard comments between plaintiff and the babysitter that might inferentially support a claim of adultery against plaintiff.[313] There was no investigator, no photograph, and no suspicious documents, texts, emails or social media posts.[314]

The supreme court's denial of plaintiff's summary judgment motion was reversed by the Second Department.[315] Writing for a unanimous court, Justice Mark Dillon held that plaintiff was entitled to summary judgment as defendant wife offered, in response to plaintiff's proof, "no facts or evidence–whether objective, inferential, or otherwise–of any adulterous conduct" beyond plaintiff's mere physical proximity with the couple's babysitter.[316] Under the circumstances of contemporary daily interactions between men and women, the mere opportunity for infidelity was viewed by Judge Dillon as insufficient to raise a triable issue of fact as to plaintiff's infidelity.[317] In so holding, Justice Dillon expressly noted that the plaintiff's own affidavit was not barred by CPLR 4502(a), as it was submitted to disprove the adultery.[318] In connection with this holding Justice Dillon opined that "the purpose [of CPLR 4502(a)] and other statutory privileges from disclosing confidential communications is

308. *Id*. at 14, 136 N.Y.S.3d at 465.
309. *Id*. at 14–15, 136 N.Y.S.3d at 465–66.
310. *Id.* at 15, 136 N.Y.S.3d at 466.
311. *Id.*
312. *Agulnick*, 191 A.D.3d at 15, 136 N.Y.S.3d at 466.
313. *Id.* at 22, 136 N.Y.S.3d at 471.
314. *Id*.
315. *Id.* at 24, 136 N.Y.S.3d at 472.
316. *Id.* at 22, 136 N.Y.S.3d at 471.
317. *Agulnick*, 191 A.D.3d at 20, 136 N.Y.S.3d at 469.
318. *Id.* at 23, 136 N.Y.S.3d at 472 (citing Tallent v. Tallent, 22 A.D.2d 988, 989, 254 N.Y.S.2d 722, 724 (3d Dep't 1964).

the public policy recognition that special relationships are akin to fiduciary bonds, which operate and flourish in an atmosphere of transcendent trust and confidence."[319]

C. Physician-Patient Privilege

In the 2018–2019 Survey,[320] there was discussion of the Court of Appeals' decision in *Brito v. Gomez*.[321] The issue in *Brito* was whether a plaintiff seeking damages for loss of enjoyment of life in a personal injury action has placed his or her entire medical condition in controversy, thereby effecting an implied waiver of the physician-patient privilege that would otherwise attach to the medical records and medical history.[322] The First Department and the Second Department had split on the issue with the First Department finding waiver only for those records pertaining to the specific injuries for which plaintiff was seeking recovery, and the Second Department finding a broad waiver of the privilege that would apply to any prior condition that could be a contributing cause of the plaintiff's diminished enjoyment of life.[323] The Court of Appeals, however, did not address these conflicting approaches, and held only in a terse decision that plaintiff's action seeking to recover damages for a 2014 motor vehicle accident which caused her difficulty in walking and standing waived the privilege for all medical records relating to prior treatment of her knees in 2009 and 2014.[324] As commentators have noted the Court of Appeals decision leaves much uncertainty as to what waiver rule applies when a plaintiff alleges loss of enjoyment of life.[325]

In the aftermath of *Brito*, the Second Department continues to adhere to its broad waiver rule as evidenced by its decision in *DiLorenzo v. Toledano*, holding that plaintiff waived the privilege

319. *Id.* (citing Lightman v. Flaum, 97 N.Y.2d 128, 133, 761 N.E.2d 1027, 1030, 736 N.Y.S.2d 300, 303 (2001)).

320. Hutter, *supra* note 193, at 422.

321. 33 N.Y.3d 1126, 1127, 131 N.E.3d 904, 904, 107 N.Y.S.3d 797, 797 (2019).

322. Hutter, *supra* note 193, at 422.

323. *See* Robert P. Carpenter, et al., *2019-2020 Survey of New York Law: Health Law*, 71 SYRACUSE L. REV. 191, 197–99 (2021).

324. *Brito*, 33 N.Y.3d at 1127, 131 N.E.3d at 905, 107 N.Y.S.3d at 797 (first citing Arons v. Jutkowitz, 9 N.Y.3d 393, 880 N.E.2d 831, 850 N.Y.S.2d 345 (2007); then citing Dillenbeck v. Hess, 73 N.Y.2d 278, 287, 536 N.E.2d 1126, 1132, 539 N.Y.S.2d 707, 713 (1989)).

325. Carpenter et. al., *supra* note 323, at 200.

applicable to a previous mental health condition as he was seeking to recover for a claimed loss of enjoyment of life due to his current injury;[326] and in *Garland v. City of New York*, holding that plaintiff placed her entire medical condition in issue through her allegation of loss of enjoyment of life.[327] Notably, neither decision cited the Court of Appeals decision in *Brito*.

The First Department post-*Brito* addressed the issue in *Akel v. Gerardi*.[328] In this medical malpractice action, plaintiff sought recover for injuries allegedly caused as a result of defendants' negligence in performing surgeries to treat her heart condition.[329] Plaintiff claimed injuries including shortness of breath, chest pain and tightness, dyspnea, heart palpitations, tachycardia, dizziness, nausea, insomnia, fatigue, maralgia paresthetica, and "difficulty with activities of daily living."[330] Defendants argued that "many of these complaints predated their treatment of plaintiff and stemmed not from this treatment but from various underlying mental health conditions."[331] They pointed to "evidence in the record that plaintiff had been diagnosed with various psychological conditions before the subject surgeries; that these psychological conditions were linked to several of the complained-of conditions; that plaintiff complained of at least some of these conditions before the alleged malpractice occurred; and that subsequently doctors were unable to locate a nonpsychological explanation for these conditions."[332] Citing *Brito*, the First Department held: "We find that this evidence is sufficient to warrant discovery as to whether or to what extent these underlying psychological conditions, and not the alleged malpractice, caused the complained-of injuries."[333]

The physician-patient privilege was addressed in *Doe v. Haight*, an action brought pursuant to the Child Victims Act, alleging that the

326. 190 A.D.3d 941, 942, 136 N.Y.S.3d 905, 906 (2d Dep't 2021).

327. 191 A.D.3d 770, 771, 138 N.Y.S.3d 352, 352 (2d Dep't 2021). Supreme court did, however, limit access to plaintiff's past medical records to the five-year period before the accident.

328. 193 A.D.3d 476, 476–77, 146 N.Y.S.3d 108, 109 (1st Dep't 2021).

329. *Id.* at 477, 146 N.Y.S.3d at 109.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Akel*, 193 A.D.3d at 477, 146 N.Y.S.3d at 109 (first citing Brito v. Gomez, 33 N.Y.3d 1126, 131 N.E.3d 904, 107 N.Y.S.3d 797 (2019); then citing Shamicka R. v. City of New York, 117 A.D.3d 574, 575, 985 N.Y.S.2d 569, 571 (1st Dep't 2014)).

individual defendant, who at the time was a priest employed by defendant Roman Catholic Diocese, sexually abused plaintiff as a minor.[334] Plaintiff sought discovery of the priest's medical and psychological records as contained in his personnel file maintained by the Diocese.[335] The Diocese, but not the priest, resisted disclosure, asserting the privilege.[336]

Judge Michael Mackey in a thorough decision compelled disclosure.[337] In his view, the Diocese could not assert privilege on behalf of the priest, and any privilege associated with the records was destroyed when he voluntarily provided them to his employer.[338] He further held that the priest was the beneficiary of the privilege, was a party to the action, and it was incumbent on him to assert any claim of privilege on his own behalf, which he did not do.[339] Notably, Judge Mackey held the medical information provided to a patient's employer for use in making employee management decisions was not privileged.[340] By agreeing to allow the Bishop to review the records, so as to convince him that the individual defendant was fit to continue serving as a priest for the Diocese, the priest necessarily opened himself up to the possibility that those records would be used in a subsequent lawsuit challenging the propriety of the Diocese's decision to terminate him.[341] Thus, there was no reasonable expectation of confidentiality.[342]

In *Arons v. Jutkowitz*, the Court of Appeals held that an attorney may privately interview an adverse party's treating physician when the adverse party has affirmatively placed his or her medical condition in issue, thereby waiving the otherwise applicable patient-physician privilege.[343] Consistent with this holding, the Court also held that the party's attorney must provide an authorization complying with the

334. 70 Misc. 3d 715, 716, 139 N.Y.S.3d 476, 476 (Sup. Ct. Albany Cnty. 2020).

335. *Id.* at 717–18, 139 N.Y.S.3d at 477–78.

336. *Id.* at 718, 139 N.Y.S.3d at 478.

337. *Id.* at 721, 139 N.Y.S.3d at 480.

338. *Id.* at 719–20, 139 N.Y.S.3d at 478–79.

339. *Haight*, 70 Misc. 3d at 719, 139 N.Y.S.3d at 478.

340. *Id.* at 719–20, 139 N.Y.S.3d at 479 (first citing State v. Gen. Elec. Co., 201 A.D.2d 802, 803, 607 N.Y.S.2d 181, 182–83 (3d Dep't 1994); then citing People v. Hitchman, 70 A.D.2d 695, 696, 416 N.Y.S.2d 374, 376 (3d Dep't 1979).

341. *Id.* at 720–21, 139 N.Y.S.3d at 480.

342. *Id.* at 721, 139 N.Y.S.3d at 480.

343. 9 N.Y.3d 393, 401–02, 880 N.E.2d 831, 832–33, 850 N.Y.S.2d 345, 346–47 (2007).

federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), permitting his or her treating physician to discuss the medical condition in issue with the attorney for the requesting party.[344] In *Sims v. Reyes* a dispute arose concerning the specific wording of an authorization provided by the plaintiff in a medical malpractice action as required by *Arons*.[345] Of note, the parties chose not to utilize the wording of the standard form promulgated by the Office of Court Administration (OCA) in response to *Arons* titled "Authorization to Permit Interview of Treating Physician by Defense Counsel."[346]

Plaintiff had provided defendant authorizations which included the following language:

READ BELOW AND PAGE 2 FOR IMPORTANT INFORMATION

> The attorneys for the defendants in this lawsuit have indicated that they intend to contact you, and will attempt to meet with you to discuss the medical treatment you have provided, and perhaps other issues that relate to a lawsuit I commenced. Although I am required to provide these defense lawyers with a written authorization permitting them to contact you, the law does not obligate you in any way to meet with them or talk with them. That decision is entirely yours. If you decide to meet with their lawyers, I would ask that you let me know, because I would like the opportunity to be present or to have my attorneys present.[347]

The language was printed in bold and in a typeface larger than used in the remainder of the authorization.[348]

The defendant objected and offered to add the following language to the authorization provided by the plaintiff: "[T]he purpose of the requested interview with the physician is solely to assist defense counsel at trial. The physician is not obligated to speak with defense counsel prior to trial. The interview is voluntary."[349] When defendant and plaintiff could not reach an agreement, defendant moved, inter

344. *Id.* at 415, 880 N.E.2d at 842, 850 N.Y.S.3d at 356.

345. 195 A.D.3d 133, 134, 147 N.Y.S.3d 300, 302 (4th Dep't 2021) (citing *Arons*, 9 N.Y.3d 393, 403, 880 N.E.2d 831, 833, 850 N.Y.S.2d 345, 347).

346. *Id.* at 134, 136–37, 147 N.Y.S.3d at 302, 304 (citing N.Y. STATE UNIFIED CT. SYS., AUTHORIZATION TO PERMIT INTERVIEW OF TREATING PHYSICIAN BY DEFENSE COUNSEL (2008), https://www.nycourts.gov/forms/criminal/pdfs/HIPAA.pdf).

347. *Id.* at 134–35, 147 N.Y.S.3d at 302 (citing Charlap v. Khan, 41 Misc. 3d 1070, 1072, 972 N.Y.S.2d 871, 872–73 (Sup. Ct. Erie Cnty. 2013).

348. *Id.* at 135, 147 N.Y.S.3d at 302.

349. *Id.*

alia, to compel plaintiff to provide revised authorizations.[350] The supreme court granted the motion in part, directing plaintiff to "provide revised HIPAA-compliant authorizations containing defendant's proposed language, unemphasized and in the same size font as the rest of the authorization."[351]

The Fourth Department affirmed the supreme court's ruling in a 4–1 decision.[352] The majority in a carefully written decision authored by Justice Shirley Troutman held that there is no requirement that the parties use the OCA form.[353] In so holding, the court did note that use of the standard form would have precluded the dispute presently before the court.[354] The issue then became whether the trial court abused its broad discretion to control discovery.[355] No abuse was present as the wording approved by the trial court was identical to the wording that had been previously approved by the Second Department.[356]

Justice Tracey Bannister dissented.[357] In her view, the plaintiff's proposed language was not improper.[358] In a compelling analysis, she observed that *Arons* "plainly did not confer on a defendant's attorney a *right* to meet privately with a plaintiff's physicians."[359] Plaintiff's proposed language did not need to be removed as it simply requested, and did not require, "that the physician inform plaintiff if the physician chooses to participate in the informal interview with defendant's attorney so that plaintiff, or his attorneys, can have an opportunity to be present."[360] Thus, "that language cannot be viewed as a condition

350. *Sims*, 195 A.D.3d at 135, 147 N.Y.S.3d at 302.

351. *Id.* at 135, 147 N.Y.S.3d at 302–03.

352. *Id.* at 133–34, 137, 147 N.Y.S.3d at 302, 304.

353. *Id.* at 137, 147 N.Y.S.3d at 304.

354. *See id.*

355. *Sims*, 195 A.D.3d at 137, 147 N.Y.S.3d at 304 (first citing *e.g.*, Voss v. Duchmann, 129 A.D.3d 1697, 1698, 12 N.Y.S.3d 428, 428 (4th Dep't 2015); then citing Forman v. Henkin, 30 N.Y.3d 656, 662, 93 N.E.3d 882, 887–88, 70 N.Y.S.3d 157, 162–63 (2018); and then citing Lisa I. v. Manikas, 183 A.D.3d 1096, 1097, 123 N.Y.S.3d 734, 735 (3d Dep't 2020); and then citing Hann v. Black, 96 A.D.3d 1503, 1504, 946 N.Y.S.2d 722, 724 (4th Dep't 2012)).

356. *Id.* (citing Porcelli v. N. Westchester Hosp. Ctr., 65 A.D.3d 176, 178, 185, 882 N.Y.S.2d 130, 132, 137 (2d Dep't 2009)).

357. *Id.* (Bannister, J., dissenting).

358. *Id.*

359. *Id.* at 138, 147 N.Y.S.3d at 305 (emphasis in original).

360. *Sims*, 195 A.D.3d at 138, 147 N.Y.S.3d at 305 (Bannister, J., dissenting).

on the informal discovery. rather, it is simply a request that the physician is free to accept or reject."[361]

The lingering question is what, if anything, did defense counsel gain by rejecting plaintiff's language. With this in mind, perhaps the major takeaway from *Sims* is that parties should utilize the OCA standard form to avoid future litigation.

V. HEARSAY

A. Business & Hospital Records

Well-settled New York evidence law provides that a statement made by a party to the litigation which is inconsistent with the party's testimony in court or the position taken by the party in the litigation is admissible under New York's admission exception to the hearsay rule and may be testified to by anyone who heard it.[362] But what about the situation where the person who heard it is not called to testify about the statement and instead a business record, such as a police accident report, medical record or commercial document, containing the statement is offered? Where a foundation for the admissibility of the report or document as a business record under CPLR 4518, New York's business records hearsay exception is established, and the statement qualifies as an admission by the adverse party and the report or document is offered against the party, the statement as recorded is admissible.[363] In two decisions, the Appellate Division, Second Department addressed the situation as to the admissibility of an admission of a party which is contained in a report or document but a foundation for the report or document as an admissible business record has not been established.[364]

Yassin v. Blackman involved the admissibility of a party's admission contained in a police accident report, which was offered against the adverse party.[365] Plaintiff commenced this action to recover damages for the personal injuries he allegedly sustained when the taxi he was operating was rear-ended while stopped for a red light

361. *Id.* (*compare with* Rivera v. Lutheran Med. Ctr., 22 Misc. 3d 178, 866 N.Y.S.2d 520 (Sup. Ct. Kings Cnty. 2008).

362. Guide to NY Evid rule 8.03, Admission by a Party, at (1)(a).

363. *See* MARTIN ET. AL., *supra* note 273, at 770–771.

364. *See generally* Yassin v. Blackman, 188 A.D.3d 62, 131 N.Y.S.3d 53 (2d Dep't 2020); Grechko v. Maimonides Med. Ctr., 188 A.D.3d 832, 134 N.Y.S.3d 435 (2d Dep't 2020).

365. *Yassin*, 188 A.D.3d at 65, 131 N.Y.S.3d at 56.

by a truck operated by the defendant.[366] Plaintiff moved for partial summary judgment on liability, relying on the rule that a rear-end collision with a stopped vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle.[367] To support factually this rule, plaintiff submitted his affidavit wherein he averred that the collision occurred when his taxi was stopped at a red light, and a copy of the police report prepared by the officer who responded to the accident.[368] His accident reported included a statement attributed to the operator of the defendants' vehicle that "HE WAS ATTEMPTING TO PASS [the plaintiff's vehicle] TO CONTINUE STRAIGHT ON WEST 48TH STREET SIDE SWIPING [the plaintiff's vehicle]."[369] The report was not certified as it could have been pursuant to CPLR 4518(c), and no foundation proof for the admissibility of the report was submitted.[370] In opposition, the defendants submitted an affidavit by defendant, who averred, in pertinent part:

> As I was driving . . . I observed a green taxi double parked to the right of my vehicle.[371] As I attempted to pass the taxi, the [p]laintiff who operated the taxi, suddenly moved forward and cut me off to get in front of my vehicle in order to make a right turn.[372]

Supreme court granted the motion, crediting defendant's admission, and concluding that defendant did not provide a non-negligent explanation sufficient to rebut plaintiff's *prima facie* case.[373] The Second Department reversed in a comprehensive opinion authored by Justice Francesca Connolly.[374] In the court's view, the defendant's admission contained in the uncertified police report was inadmissible because a foundation for the admission of the accident

366. *Id.* at 64, 131 N.Y.S.3d at 55.
367. *Id.* at 64, 68, 131 N.Y.S.3d at 55, 58 (*citing* Tutrani v. Cnty. of Suffolk, 10 N.Y.3d 906, 908, 891 N.E.2.d 726, 727, 861 N.Y.S.2d 610, 611 (2008).
368. *Id.* at 64, 131 N.Y.S.3d at 55.
369. *Id.* at 64, 131 N.Y.S.3d at 54.
370. *Yassin*, 188 A.D.3d at 65–66, 131 N.Y.S.3d at 56–57.
371. *Id.*
372. *Id.* at 64, 131 N.Y.S.3d at 55.
373. *See id.*
374. *Id.* at 63–64, 131 N.Y.S.3d at 55.

report containing the admission was not established.[375] In so holding, the court rejected a line of cases holding otherwise.[376]

Justice Connolly made clear in her opinion that when a party offers as a business record, such as a police report, under the business records exception for the admission contained therein, two levels of hearsay are present.[377] The first level is the report containing the admission, and the second level is the admission itself.[378] A double-hearsay issue is thus present, and for the report containing the admission to be admitted there must be applicable exceptions to the hearsay rule that can be invoked for both levels.[379] As a result, merely showing the statement in the report is admissible under the admissions exception is not enough to admit it into evidence.[380] Rather, a foundation for the admission of the report itself as a business record must also be established.[381] Here, there was no foundation established for the admission of the accident report under the business records exception.[382]

While *Yassin* ruled with respect to a police accident report, its holding, and approach, is equally applicable in all situations where a party admission is contained in a document, namely, the admission is admissible only if its proponent establishes that the document itself qualifies for admission under the business records exception by the

375. *Yassin*, 188 A.D.3d at 67, 131 N.Y.S.3d at 57.

376. *Id.* (first citing Gezelter v. Pecora, 129 A.D.3d 1021, 13 N.Y.S.3d 141 (2d Dep't 2015); then citing Harrinarain v. Sisters of Saint Joseph, 173 A.D.3d 983, 104 N.Y.S.3d 661 (2d Dep't 2019); and then citing Batashvili v. Veliz-Palacios, 170 A.D.3d 791, 96 N.Y.S.3d 146 (2d Dep't 2019); and then citing Ganchrow v. Kremer, 157 A.D.3d 771, 69 N.Y.S.3d 352 (2d Dep't 2018); and then citing Lezcano-Correa v. Sunny's Limousine Serv., Inc., 145 A.D.3d 766, 43 N.Y.S.3d 129 (2d Dep't 2016); and then citing Lesaldo v. Dabas, 140 A.D.3d 708, 32 N.Y.S.3d 321 (2d Dep't 2016)).

377. *See id.* at 65, 131 N.Y.S.3d at 56 (citing Memenza v. Cole, 131 A.D.3d 1020, 1022, 16 N.Y.S.3d 287, 289 (2d Dep't 2015)).

378. *Id.* at 65–66, 131 N.Y.S.3d at 56.

379. *Id.* at 65, 131 N.Y.S.3d at 56 (citing *Memenza*, 131 A.D.3d at 1022, 16 N.Y.S.3d at 289).

380. *See generally Yassin*, 188 A.D.3d.at 65, 131 N.Y.S.3d at 56.

381. *Id.* at 65–66, 131 N.Y.S.3d at 56 (citing People v. Mertz 68 N.Y.2d 136, 148, 497 N.E.2d 657, 663, 506 N.Y.S.2d 290, 296 (1986)).

382. *Id.* at 66, 131 N.Y.S.3d at 57 (citing Johnson v. Lutz, 253 N.Y 124, 128, 170 N.E. 517, 518 (1930)). Of course, had the report been certified pursuant CPLR 4518(c), rendering the report admissible under the exception, the admission of the defendant contained therein would have been admissible. *See* N.Y. C.P.L.R. 4518(c) (McKinney 2021).

establishment of *all* of the exception's foundation elements, statutory and judicially created. The type of document involved does not require any specifics to the document carve-out exception to *Yassin*'s holding. Thus, admissions in hospital records should be addressed under *Yassin's* holding and a foundation for the hospital record as a business record to allow for the admission of an admission contained therein will need to be established.[383]

However, the Second Department, in a decision decided two months after *Yassin*, *Grechko v. Maimonides Medical Center*, held otherwise, albeit *in dictum*.[384] At issue in this wrongful death medical malpractice action in which plaintiff alleged that the defendant hospital was negligent in failing to recognize the seriousness of decedent's pneumonia in discharging him was the admissibility of two entries in decedent's hospital records.[385] An attending physician at the hospital wrote in decedent's hospital record that according to decedent's primary care physician the decedent signed an AMA ("against medical advice") form at the Medical Center; and a resident wrote that decedent was recommended hospitalization at the Medical Center but signed an AMA form.[386] The hospital argued that these entries showed decedent left the hospital against its medical advice, and they were admissible because they reflected what decedent told the physician and the resident.[387]

The Second Department recognized that an entry in a hospital record is admissible under the business records exception upon a foundation establishing the statutory foundation elements and the judicially created foundation element that the entry is germane to

383. *See* Alexander, Practice Commentary, McKinney's Consol Laws of NY, Book 7B, N.Y. C.P.L.R. 4518; *see also* Michael J. Hutter, *Admissibility of Patient's Statement in Medical Record*, 244 N.Y.L.J. 3, 7 (2010).

384. 188 A.D.3d 832, 834, 134 N.YS.3d 435, 439 (2d Dep't 2020). It should be noted that last year's *Survey* contained a discussion of Grechko v. Maimonides Med. Ctr. as decided by the Second Department in September 2019. *See*, 2019-2020 Evidence Survey *supra*, note 7, at 180–81 (discussing *Grechko*, 175 A.D.3d 1261, 109 N.Y.S.3d 418 (2d Dep't 2019)). However, that decision was recalled and vacated by the Second Department by its November 2020 decision. *Grechko*, 188 A.D.3d at 832, 134 N.Y.S.3d at 437. Of note, both decisions utilized identical rationale on the hearsay issue, with the November 2020 decision adding more discussion.

385. *Grechko*, 188 A.D.3d at 833, 134 N.Y.S.3d at 438.

386. *Id.* at 832–33, 134 N.Y.S.3d at 437–38.

387. *Id.* at 833, 134 N.Y.S.3d at 438 (first citing Berkovits v. Chaaya, 138 A.D.3d 1050, 1052, 31 N.Y.S.3d 531, 533; and then citing C.P.L.R. 4518(a)).

treatment and diagnosis.[388] The court held the two entries were in fact germane to decedent's diagnosis and treatment.[389] The court then turned to the double hearsay issue present, and specifically the sources of the information written down in decedent's record by the physician and the resident.[390] In doing so, the court noted that to satisfy the double hearsay issue present, the hospital argued the statement as recorded were the admissions of the decedent.[391] Upon an analysis of the facts, the court concluded, however, that the source of the information recorded was not shown to be the decedent, and thus the admission exception could not be invoked to satisfy the double hearsay issue.[392] As a result, the court concluded neither of the entries were admissible.[393]

The Second Department's analysis and conclusion is clearly correct. However, the court in the course of its decision made the following statement: "If an entry in the medical records 'is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to diagnosis or treatment, as long as there is 'evidence connecting the party to the entry.'"[394] Since the germane to treatment and diagnosis element is a foundation element, and the failure to establish that element precludes admissibility of the hospital record under the business records exception, the court's *dictum* is contrary to its double hearsay holding in *Yassin*. Needless to say, the court will need to reconcile, if it can, its language in *Grechko* with its analysis in *Yassin*. Suffice it to say, the *dictum* is wrong, and in a future case should be rejected.[395]

388. *Id.*

389. *Id.* at 834, 134 N.Y.S.3d at 438.

390. *Grechko*, 188 A.D.3d at 834–35, 134 N.Y.S.3d at 439 (first citing Robles v. Polytemp, Inc., 127 A.D.3d 1052, 1054, 7 N.Y.S.3d 441, 443 (2d Dep't 2015); then citing Coker v. Bakkal Foods, Inc., 52 A.D.3d 765, 766, 861 N.Y.S.2d 384, 386 (2d Dep't 2008); then citing Cuevas v. Alexander's, Inc., 23 A.D.3d 428, 429, 805 N.Y.S.2d 605, 606 (2d Dep't 2005); then citing Thompson v. Green Bus Lines, Inc., 280 A.D.2d 468, 468 721 N.Y.S.2d 70, 70 (2d Dep't 2000); and then citing Echeverria v. New York, 166 A.D.2d 409, 410, 560 N.Y.S.2d 473, 474 (2d Dep't 1990)).

391. *Id.* at 833, 134 N.Y.S.3d at 438.

392. *Id.* at 834, 134 N.Y.S.3d at 439.

393. *Id.*

394. *Id.*

395. *See* Alexander, *supra* note 383, at C4518:3 Layers of Hearsay; The Rule in *Johnson v. Lutz.*

B. Statement Made for Medical Diagnosis or Treatment

Under New York's emergent statement made for diagnosis and treatment exception, a statement made to a health care professional for purposes of medical treatment and diagnosis which describes present or past pain or symptoms, or their general cause, or describes medical history and is germane to diagnosis or treatment is not barred by the hearsay rule.[396] This exception was discussed in two Appellate Division, Third Department decisions.

In *People v. Maisonette*, defendant was charged with crimes relating to his sexual abuse of an 11-year-old child.[397] The People sought admission of the testimony of two medical professionals and the victim's medical records, all of which revealed the victim's statements to them that defendant had sexually abused her under the exception.[398] The basis for the People's argument was that the medical professionals who treated her would need to know the identity of the perpetrator to know that her treatment plan would place her in a safe environment, and thus their testimony was admissible under the exception.[399] Of note, the examining physician assistant testified that knowing the identity of the perpetrator was not necessary for her treatment, but the examining pediatrician testified that the identity of the perpetrator was relevant information and important for the proper treatment of the child.[400] The Court held the trial court did not err in admitting the testimony and medical records, under the exception.[401] In its view, the trial court could properly rely upon the testimony of the pediatrician in concluding the evidence was germane to the victim's diagnosis and treatment[402] with respect to a proper discharge plan for her.[403]

396. *Id.*

397. 192 A.D.3d 1325, 1326, 144 N.Y.S.3d 752, 756 (3d Dep't 2021).

398. *Id.* at 1329, 144 N.Y.S.3d at 759.

399. *Id.*

400. *Id*.

401. *Id.* (first citing People v. Ortega, 15 N.Y.3d 610, 617, 942 N.E.2d 210, 214, 917 N.Y.S.2d 1, 5 (2010); then citing People v. Garrand, 189 A.D.3d 1763, 1769, 134 N.Y.S.3d 583, 589 (3d Dep't 2020); then citing People v. Nelson, 128 A.D.3d 1225, 1228, 10 N.Y.S.3d 343, 346–47 (3d Dep't 2015); and then citing People v. Rogers, 8 A.D.3d 888, 892, 780 N.Y.S.2d 393, 397 (3d Dep't 2004).

402. *Maisonette*, 192 A.D.3d at 1329, 144 N.Y.S.3d at 759.

403. *Id*. at 1329–30, 144 N.Y.S.3d at 759 (*see* People v. Duhs, 16 N.Y.3d 405, 408, 947 N.E.2d 617, 618, 922 N.Y.S.2d 843, 844 (2011); People v. Hansson, 162 A.D.3d 1234, 1239, 79 N.Y.S.3d 341, 346–47 (3d Dep't 2018); *In re Luis P.*, 161 A.D.3d 59, 76, 74 N.Y.S.3d 221, 233–34 (1st Dep't 2018).

Maisonette is an important decision as it shows that care must be taken to establish that the statement is germane to treatment. That care requires testimony from a physician who is qualified to render an opinion about the relevancy of the testimony in issue.

In *Matter of Jill Q. v. James R.*, at issue was whether Family Court in a custody proceeding erred in refusing to admit certain statements of the child made to her mental health counselor.[404] A few weeks prior to the child's ninth birthday, the father and the child had met for the first time.[405] Thereafter, "pursuant to an October 2016 order entered upon consent, the parties shared joint legal custody of the child."[406] Subsequently, the mother filed a petition to modify the joint legal custody arrangement, contending the child exhibited signs of physical and emotional distress relating to the father's parenting time.[407] At the hearing, testimony was presented that the child's mental health progressively declined over the months following her introduction to her father.[408] The child's mental health counselor testified that she initially suffered from an adjustment disorder stemming from her difficulty adjusting to the father's sudden presence in her life, and that she subsequently developed situational depression and clinical depression.[409] However, family court precluded the counselor from testifying as to any statements made by the child that formed the basis for the counselor's diagnosis and treatment of the child.[410]

The Third Department held family court erred in excluding the challenged counselor's testimony.[411] In its view, the testimony plainly fell within the exception.[412] The exclusion required a new hearing, before a different judge, because the testimony would have been relevant to determining the cause of the child's distress and to fashion proper parenting provisions.[413] The court's ruling shows the broad range of statements made by a person to his or her healthcare

404. 185 A.D.3d 1106, 1106, 127 N.Y.S.3d 190, 190 (3d Dep't 2020).
405. *Id.* at 1107, 127 N.Y.S.3d at 192.
406. *Id.*
407. *Id.*
408. *Id.* at 1108–09, 127 N.Y.S.3d at 193–94.
409. *In re Jill Q.*, 185 A.D.3d at 1109, 127 N.Y.S.3d at 194.
410. *Id.*
411. *Id.* (first citing People v. Spicola, 16 N.Y.3d 441, 451, 947 N.E.2d 620, 625, 922 N.Y.S.2d 846, 851 (2011); then citing People v. Ortega, 15 N.Y.3d 610, 618, 942 N.E.2d 210, 214–15, 917 N.Y.S.2d 1, 5–6 (2010)).
412. *Id.*
413. *Id.* at 1110, 127 N.Y.S.3d at 195.

professional that can be admissible under the exception. It is not an overstatement to state that the court is permitting a person's entire history as related to a health care professional to be admissible under the exception once there is a showing that the information related is germane to diagnosis and treatment.

C. Hearsay Within Hearsay

Hearsay within hearsay, sometimes called double or multiple hearsay, refers to evidence which involves a declarant's out-of-court statement which contains another out-of-court statement.[414] New York evidence law recognizes that a hearsay statement included within a hearsay statement is not excluded by the hearsay rule if each part of the combined statement is separately admissible under a hearsay exception.[415] The rule was applied in *People v. Jones* by the Appellate Division, Fourth Department.[416]

In this manslaughter prosecution, "defendant made an offer of proof with respect to the prospective testimony of a police officer that she has been told by another person that someone else—i.e., a person other than defendant— was responsible for killing the victim."[417] The trial court ruled the testimony was not admissible and the Fourth Department affirmed.[418] The court recognized that the proposed testimony constituted "double hearsay," which, as noted above, is admissible only if each hearsay statement involved falls within an exception to the hearsay rule.[419] As such, the testimony was inadmissible as the statement made to her relaying the purported third-

414. *See* Flynn v. Manhattan & Bronx Surface Tr. Operating Auth., 61 N.Y.2d 769, 770–71, 461 N.E.2d 291, 293, 473 N.Y.S.2d 154, 156 (1984).

415. Guide to NY Evid rule 8.21, Hearsay in Hearsay (citing People v. Ortega, 15 N.Y.3d 610, 620–21, 942 N.E.2d 210, 216–17, 917 N.Y.S.2d 1, 7–8 (2010)).

416. *People v. Jones*, 192 A.D.3d 1524, 1525, 140 N.Y.S.3.d 836, 837 (4th Dep't 2021) (first citing People v. Brensic, 70 N.Y.2d 9, 14, 509 N.E.2d 1226, 1228, 517 N.Y.S.2d 120, 122 (1987); then citing People v. Meadow, 140 A.D.3d 1596, 1598, 33 N.Y.S.3d 597, 600 (4th Dep't 2016)).

417. *Id.* at 1524–25, 140 N.Y.S.3d at 837.

418. *Id.* at 1525, 140 N.Y.S.3d at 837 (first citing *Brensic*, 70 N.Y.2d at 14, 509 N.E.2d at 1228, 517 N.Y.S.2d at 122; and then citing *Meadow*, 140 A.D.3d at 1598, 33 N.Y.S.3d at 600).

419. *Id.* at 1525, 140 N.Y.S.3d at 837 (first citing Kamenov v. N. Assurance Co. of Am., 259 A.D.2d 958, 959, 687 N.Y.S.2d 838, 839 (4th Dep't 1999); then citing People v. Myhand 120 A.D.3d 970, 973, 991 N.Y.S.2d 222, 226 (4th Dep't 2014)).

party admission constituted hearsay and did not fit within any exceptions to the hearsay rule.[420]

VI. EXPERT TESTIMONY

A. Bases

It is axiomatic in New York that an expert's opinion must be based on facts and a proper source of facts is evidence that is admitted at the trial in which the expert is testifying or evidence that is admissible on a summary judgment motion in which the expert has provide an opinion in affidavit or affirmation.[421] This quintessential evidence principle was applied in two decisions from the Appellate Division, First Department, *Ebalo v. Trustees of Columbia University*[422] and *Guido v. Fielding*.[423]

In *Ebalo*, plaintiff was injured when a bathroom ceiling light fixture, filled with water and fell on him.[424] A toilet in the apartment immediately above plaintiff's apartment had been installed by the defendant plumber a few months earlier.[425] Plaintiff's action was predicated on his claim that the toilet had been negligently installed, which caused it to leak and that leak in turn caused the bathroom light to come loose from the ceiling.[426] Prior to the commencement of the action, the apartment building's owner disposed of the toilet.[427] To defeat defendant's summary judgment motion, plaintiff submitted a sworn report from his expert wherein the expert opined that defendant had negligently installed the toilet, and that such negligence was a proximate cause of the bathroom light falling.[428] His opinion was

420. *Id.*

421. *See* Alexander, *supra* note 393, at §7.12.

422. 192 A.D.3d 626, 627, 146 N.Y.S.3d 93, 94–95 (1st Dep't 2021) (first citing Grace v. New York City Transit Auth., 123 A.D.3d 401, 402, 998 N.Y.S.2d 36, 38 (1st Dep't 2014); then citing McLaughlin v. Thyssen Dover Elevator Co., 117 A.D.3d 511, 512, 985 N.Y.S.2d 534, 535 (1st Dep't 2014)).

423. 190 A.D.3d 49, 53, 134 N.Y.S.3d 34, 38 (1st Dep't 2020) (citing Goldson v. Mann, 173 A.D.3d 410, 411, 102, N.Y.S.3d 184, 185 (1st Dep't 2019)).

424. *Ebalo*, 192 A.D.3d at 626, 146 N.Y.S.3d at 94.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.* at 627, 146 N.Y.S.3d at 94–95 (first citing Grace v. New York City Transit Auth., 123 A.D.3d 401, 402, 998 N.Y.S.2d 36, 38 (1st Dep't 2014); then citing McLaughlin v. Thyssen Dover Elevator Co., 117 A.D.3d 511, 512, 985 N.Y.S.2d 534, 535 (1st Dep't 2014)).

based upon facts obtained from the deposition transcripts of the apartment's superintendent, plumbers who had examined the toilet before it was disposed of, and of the upstairs tenant who denied any physical damages to the toilet after it was installed.[429]

The First Department rejected defendant's argument that the expert's opinion was speculative because the expert did not examine the toilet.[430] It held the opinion was not speculative, and admissible because the facts the expert utilized to support his opinion were obtained from admissible sources, the deposition transcripts.[431]

In *Guido*, previously discussed in the context of the admissibility of habit evidence, defendant Dr. Fielding submitted in support of his summary judgment motion seeking dismissal of the complaint an affidavit form his medical expert.[432] The expert opined that Dr. Fielding's "treatment of plaintiff was proper in all respects and was in accordance with the standard of care at all times."[433] The opinion was predicated in large part upon the deposition testimony of Dr. Fielding regarding his claimed custom and practice during the subject surgical procedure, specifically, that he would palpitate the bowel during the surgical procedure.[434] In response, plaintiff argued that the opinion should be rejected as incompetent because it was predicated upon Dr. Fielding's testimony regarding his custom and practice which was inadmissible.[435] The testimony was inadmissible, plaintiff further argued, because it did not constitute otherwise admissible habit evidence.[436]

In addressing plaintiff's argument, the First Department noted that there were no facts establishing Dr. Fielding had actually palpated plaintiff's bowel as Dr. Fielding had no independent recollection as to whether he did so and the hospital surgical records did not show that Dr. Fielding said so.[437] Thus, the opinion here could only be found to be factually supported if Dr. Fielding's testimony regarding his

429. *Ebalo*, 192 A.D.3d at 627, 146 N.Y.S.3d at 94–95 (citing *Grace*, 123 A.D.3d at 402, 998 N.Y.S.2d at 38; and then citing *McLaughlin*, 117 A.D.3d at 512, 985 N.Y.S.2d at 535).

430. *Id.* at 626, 146 N.Y.S.3d at 94.

431. *Id.* at 626–27, 146 N.Y.S.3d at 94–95.

432. Guido v. Fielding, 190 A.D.3d 49, 52–53, 134 N.Y.S.3d 34, 37 (1st Dep't 2020); *see* discussion accompanying *infra n*otes 194–205.

433. *Id.* at 52, 134 N.Y.S.3d at 37.

434. *Id*. at 52, 134 N.Y.S.3d at 36–37.

435. *Id*. at 53, 134 N.Y.S.3d at 37.

436. *Id*.

437. *Guido*, 190 A.D.3d at 53, 134 N.Y.S. 3d at 38.

custom and practice constituted admissible habit evidence.[438] As previously discussed, the Court found it did not, which finding resulted in the conclusion that the expert's opinion was inadmissible. As a result, Dr. Fielding's summary judgment motion was denied.[439]

New York law also states that an expert may base his or her opinion on evidence which has not been admitted or even if the evidence is inadmissible in a limited situation, namely, the evidence is of a kind accepted in the relevant profession as reliable in forming a professional opinion, and it is shown that the evidence is reliable.[440] This so-called "professional reliability" basis was in issue in *Delosh v. Amyot*.[441]

In this motor vehicle accident case, plaintiff's son was killed when, while riding his bike, he was struck by a car driven by defendant.[442] Plaintiff moved for partial summary judgment on liability, which motion Supreme Court denied.[443] In affirming, the Appellate Division, Third Department noted that plaintiff's motion was supported by an expert affidavit of an accident reconstructionist, and that apart from the parties' depositions, all of the documents that the expert utilized in forming his opinion were unsworn, uncertified and/or unauthenticated.[444] Recognizing that these documents did not constitute admissible evidence, and thus could not be used to support the expert's opinion, plaintiff argued that under the "professional reliability" basis they could properly be used to support the opinion.[445] The Third Department observed that although the professional reliability basis allows an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, it must be shown to be the type of material commonly relied on in the profession and reliable, and furthermore, even if such reliability is shown, it may not be the sole basis for the expert's opinion.[446] Here, none of the requirements

438. *Id.*

439. *Id.* at 54, 134 N.Y.S.3d at 38.

440. *Id.* (first citing People v. Goldstein, 6 N.Y.3d 119, 124, 843 N.E.2d 727, 730, 810 N.Y.S.2d 100, 103 (2005); then citing Hambsch v. New York City Transit Auth., 63 N.Y.2d 723, 726, 469 N.E.2d 516, 518, 480 N.Y.S.2d 195, 197 (1984)).

441. *See* Delosh v. Amyot, 186 A.D.3d 1793, 1796, 130 N.Y.S.3d 129, 132 (3d Dep't 2020).

442. *Id.* at 1794, 130 N.Y.S.3d at 130.

443. *Id.*

444. *Id.* at 1794–96, 130 N.Y.S.3d at 130–32.

445. *Id.* at 1794, 130 N.Y.S.3d at 131.

446. *Delosh*, 186 A.D.3d at 1796, 130 N.Y.S.3d at 132 (quoting Kendall v. Amica Mut. Ins. Co., 135 A.D.3d 1202, 1205, 23 N.Y.S.3d 702, 706 (3d Dep't

were present with respect to the expert's opinion.[447] As such, his expert affidavit invoking the "professional reliability" bases was of no probative value and was too speculative to meet plaintiff's initial burden on her motion, requiring denial of the motion.[448]

Delosh is an instructive opinion as it shows that the courts strictly apply the elements of the "professional reliability" basis when that basis is invoked to support an expert's opinion. In this connection, it is notable that the Third Department in *Delosh* rejected plaintiff's end-run effort to avoid the consequences of the absence of admissible evidence supporting his expert's opinion by the invoking of the "professional reliability" basis.

B. Frye

In determining the admissibility of novel expert evidence, New York follows the rule of *Frye v. United States*.[449] Under that rule, "expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained general acceptance in the specified field."[450] The *Frye* rule was fully discussed and then applied in a thoughtful opinion of the Appellate Division, Second Department in *Farrell v. Lichtenberger*.[451]

In this medical malpractice action, plaintiff alleged the defendants negligently injected gadolinium, a contrast agent, directly into the tissue of her arm instead of her vein in preparation for an MRI, causing the plaintiff to develop, among other things, nephrogenic systemic fibrosis.[452] In her expert witness disclosure plaintiff expressed her intention to call Stephen Paget, her treating physician, as an expert witness at trial.[453] This disclosure indicated that Paget was expected to testify that the defendants deviated from good and

2016)); (citing Greene v. Robarge, 104 A.D.3d 1073, 1074, 962 N.Y.S.2d 470, 472 (3d Dep't 2013)).

447. *Id.*

448. *Id.* The court referred, erroneously, to the basis as the "professional reliability exception to the hearsay rule." *See* John M. Curran, *The "Professional Reliability" Basis for Expert Opinion Testimony,* 85 N.Y. STATE BAR J. 22, 23 (2013).

449. *See* 293 F. 1013 (D.C. 1923).

450. People v. Wesley, 83 N.Y.2d 417, 422, 633 N.E.2d 451, 454, 611 N.Y.S.2d 97, 100 (1994) (*citing Frye*, 293 F. at 1014).

451. *See* 194 A.D.3d 1013, 1015–16, 146 N.Y.S.3d 314, 317–18 (2d Dep't 2021).

452. *Id.* at 1014, 146 N.Y.S.3d at 316.

453. *Id.* at 1014–15, 146 N.Y.S.3d at 316.

accepted medical practice in allowing gadolinium, a toxin, to leak into and remain inside the plaintiff's arm in high concentration, which caused the plaintiff to develop injuries including a progressive fibrosis disease.[454] Plaintiff moved, inter alia, to preclude Paget's testimony on the issue of medical causation, or, in the alternative, for a *Frye* hearing on the admissibility of such evidence.[455] Supreme court granted that branch of the defendants' motion which was for a *Frye* hearing.[456] Following the hearing, the court granted that branch of the defendants' motion which was to preclude Paget's testimony.[457] Thereafter, the defendants made an oral application, in effect, to dismiss the complaint insofar as asserted against them on the ground that the plaintiff could not prove her case without a medical expert on causation.[458] The supreme court granted the defendants' application and directed dismissal of the complaint.[459]

The Second Department reversed, concluding that supreme court erred in its *Frye* analysis.[460] The court noted that supreme court rejected Dr. Piaget's opinion because of the absence of medical literature unequivocally establishing that the administration of gadolinium into tissue has a causal link to the development of a systemic fibrosing disease in the absence of renal insufficiency.[461] This was error because a *Frye* inquiry "is not concerned with the reliability of a certain expert's conclusions, but instead with whether the experts' deductions are based on principles that are sufficiently established to have gained general acceptance as reliable."[462] As to "general acceptance," the court observed that it is not required that a majority of the scientists involved subscribe to the opinion expressed but that the expert espousing his or her opinion has followed generally accepted scientific principles and methodology in evaluating clinical data to reach the expressed opinion.[463] In this connection, the court expressly noted that it is sufficient that the expert's opinion is based

454. *Id.* at 1015, 146 N.Y.S.3d at 316–17.

455. *Id.*

456. *Farrell*, 194 A.D.3d at 1015, 146 N.Y.S.3d at 317.

457. *Id.*

458. *Id.*

459. *Id.* at 1015, 146 N.Y.S.3d at 317.

460. *Id.* at 1016, 146 N.Y.S.3d at 317–18.

461. *Farrell*, 194 A.D.3d at 1016, 146 N.Y.S.3d at 317–18.

462. *Id.* at 1015, 146 N.Y.S.3d at 317 (quoting Lugo v. New York City Health & Hosps. Corp., 89 A.D.3d 42, 56, 929 N.Y.S.2d 264, 274 (2d Dep't 2011)).

463. *Id.* at 1015, 146 N.Y.S.3d at 317 (quoting Zito v. Zabarsky, 28 A.D.3d 42, 44, 812 N.Y.S.2d 535, 537 (2d Dep't 2006)).

upon "a synthesis of various studies or cases [that] reasonably permits the conclusion reached by the . . . expert."[464]

Turning to Dr. Piaget's opinion, the court concluded that it was reasonably permitted by a synthesis of some of the medical literature presented to the supreme court.[465] That literature established that the expert's theory had an objective basis and was founded upon far more than theoretical speculation or a scientific hunch.[466] The court added that the lack of textual authority to support the theory pertained to the weight to be given to his testimony, but did not preclude its admissibility.[467]

Farrell bears consideration because it shows that is not necessary for an expert to support his or her opinion with studies or cases based on circumstances exactly parallel to those involved in the action in which the expert is providing his or her opinion. It sanctions reliance by the expert on a "synthesis" of the relevant data and studies. However, *Farrell* also cautions that such "synthesis" must be reasonable and have an objective basis.

VII. NON-TESTIMONIAL EVIDENCE

A. Writings

New York law gives general authority to use in most contexts electronic signatures in place of "wet ink" signatures. Section 304(2) of New York's "Electronic Signatures and Records Act" (ESRA) provides: "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand."[468] Moreover, the statutory definition of what constitutes an "electronic signature" is extremely broad under the ESRA as it includes any "electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record."[469] Emails in this connection are generally signed by the sender typing his or her name or by inserting a prepopulated

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464. *Id*.

465. *Id*. at 1016, 116 N.Y.S.3d at 317–18.

466. *Farrell*, 194 A.D.3d at 1016, 146 N.Y.S.3d at 317 (citing LaRose v. Corrao, 105 A.D.3d 1009, 1010, 963 N.Y.S.2d 712, 714 (2d Dep't 2013)).

467. *Id.* at 1016, 146 N.Y.S.3d at 317.

468. N.Y. STATE TECH. LAW § 304(2) (McKinney 2021).

469. *Id.* at § 302(3).

name at the end of the email.[470] While this form of an electronic signature is valid, that signature still needs to be authenticated in order to have the document so signed admitted into evidence.[471] The Appellate Division, First Department in *Philadelphia Insurance Indemnity Co. v. Kendall* addressed an issue of email authentication in the context of a purported settlement agreement.[472] While its holding is specific to the enforceability of a settlement agreement (apparently) reached via email, the decision has broader implications.

As the timeline of the parties' actions is interesting, if not entirely important, it must be fully addressed. Respondent Erika Kendall was injured while driving her employer's car when a car owned and operated by Khaliah Martin collided with her car.[473] Martin carried automobile liability insurance with policy limits in a lesser amount than those maintained by respondent's employer, which was insured by petitioner Philadelphia Insurance Indemnity Company (Philadelphia).[474] Kendall settled her personal injury claim against Martin, receiving the full policy amount of $25,000.[475] Kendall then made a claim under the Supplementary Underinsured Motorist (SUM) benefit provision in the employer's automobile policy with Philadelphia.[476] Kendall and Philadelphia proceeded to arbitration before the American Arbitration Association on Kendall's claim for SUM benefits.[477] The arbitration hearing was held on August 15, 2019.[478] Before, during, and after the arbitration hearing, the parties sought to settle Kendall's claim.[479] The arbitrator rendered her decision on September 16, 2019, awarding Kendall $975,000 and the decision was emailed to Kendall's counsel and faxed to Philadelphia's counsel that same day.[480] Apparently, neither party saw the decision and they continued to negotiate.[481] On September 19, 2019, the parties reached an agreement to settle the dispute for $400,000.[482] On that

470. *Id.* at Comment 5: Electronic Signatures.
471. FED. R. EVID. 901.
472. 197 A.D.3d 75, 76, 151 N.Y.S.3d 392, 392 (1st Dep't 2021).
473. *Id.*
474. *Id.* at 76–77, 151 N.Y.S.3d at 392.
475. *Id.*
476. *Id.* at 77, 151 N.Y.S.3d at 394.
477. *Phila. Ins. Indemnity Co.,* 197 A.D. 3d at 77, 151 N.Y.S.3d at 392–94.
478. *Id.* at 77, 151 N.Y.S.3d at 394.
479. *Id.*
480. *Id.*
481. *Id.*
482. *Phila. Ins. Indemnity Co.,* 197 A.D.3d at 77, 151 N.Y.S.3d at 394.

day, Kendall's counsel emailed Philadelphia's counsel: "Confirmed - we are settled for 400K."[483]

> Below this appeared "Sincerely," followed by counsel's name and contact information.[484] Shortly thereafter, [Philadelphia's] counsel emailed in reply, attaching a general release, styled a "Release and Trust Agreement," and saying, "Get it signed quickly before any decision comes in, wouldn't want your client reneging."[485] Respondent's counsel answered, "Thank you. Will try to get her in asap."[486] This email concluded with the same valediction, name, and contact information as had respondent's counsel's earlier email.[487]
>
> After respondent's counsel received the arbitrator's decision and before respondent signed the Release and Trust Agreement, counsel indicated that he would not proceed with the $400,000 settlement and demanded payment of the $975,000 awarded by the arbitrator.[488]

Kendall's counsel argued that the settlement agreement was not properly "subscribed" so as to make it a binding stipulation under CPLR 2104.[489] That provision provides:

> An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.[490]

Philadelphia then commenced a special proceeding to enforce the settlement agreement, and to vacate the arbitral award.[491] The supreme court denied the requested relief, concluding the settlement was invalid for two reasons.[492] First, the attorney's name at the end of the email was in a prepopulated block, rather than the attorney name retyped at the end of the email.[493] According to the First Department precedent, for there to be a binding settlement under CPLR 2104,

483. *Id.*
484. *Id.*
485. *Id.*
486. *Id.*
487. *Phila. Ins. Indemnity Co.,* 197 A.D.3d at 77, 151 N.Y.S.3d at 394.
488. *Id.*
489. *Id.* at 76, 151 N.Y.S.3d at 394.
490. N.Y. C.P.L.R. 2104 (McKinney 2021).
491. *Phila. Ins. Indemnity Co.,* 197 A.D.3d at 77, 151 N.Y.S.3d at 395.
492. *Id.* at 76–77, 151 N.Y.S.3d at 394–95.
493. *Id.* at 76, 151 N.Y.S.3d at 394.

retyping of the name was required to satisfy the statutory mandate that the writing be "subscribed."[494] Second, the email did not include all of the material terms of the settlement as Kendall's signature to the release was a necessary occurrence to finalize the settlement and that did not occur.[495]

The First Department reversed, and enforced the settlement.[496] In doing so, the court in a thoughtful decision authored by Justice Moulton overturned its prior precedent relied upon by the supreme court.[497] It noted that a "distinction between prepopulated and retyped signatures in emails reflects needless formality that does not reflect how law is commonly practiced today."[498] The new rule announced is that the email's sign-off form of signature is not the controlling factor but rather the transmission of the email.[499] When counsel hits "send" with the intent of relaying a settlement offer or acceptance, the email transmission satisfies CPLR 2104.[500] Here, the court found the settlement was intentionally sent by counsel with the clear intent to settle the matter and that all of the material elements of the settlement were satisfied.[501]

While the First Department's holding that the sending of an email can qualify as a binding stipulation is a significant holding, the court's additional discussion merits attention as well. In this regard, the court acknowledged that not "every email purporting to settle a dispute will be unassailable evidence of a binding settlement."[502] It specifically pointed to the evidentiary authentication requirement that requires a showing that the email is authentic is also required for the email's admissibility, *i.e.*, it was in fact sent by the person claimed to have sent it as set forth in the sender header.[503] Here, the authentication requirement was met by reason of the fact that the email came from an attorney's account, specifically a rebuttable presumption of authentication is created.[504]

494. *Id.*
495. *Id.* at 76, 78, 151 N.Y.S.3d at 394, 395.
496. *Phila. Ins. Indemnity Co.*, 197 A.D.3d at 76, 151 N.Y.S.3d at 394.
497. *Id.* at 75, 151 N.Y.S.3d at 393.
498. *Id.* at 79, 151 N.Y.S.3d at 396.
499. *Id.* at 79–80, 151 N.Y.S.3d at 396.
500. *Id.* at 80, 151 N.Y.S.3d at 396.
501. *Phila. Ins. Indemnity Co.,* 197 A.D.3d at 80, 151 N.Y.S.3d at 397.
502. *Id.* at 81, 151 N.Y.S.3d at 397.
503. *Id.*
504. *Id.*

The First Department is seemingly holding that the email address of an attorney in the sender header is by itself enough to authenticate the email as being sent by that attorney. While one can reasonably argue that such holding is appropriate, one can expect that it will lead to argument in the future as to its extension to other types of senders. For example, does an email coming from a hospital's email account carry a presumption that the hospital in fact sent it and what about a commercial business? Ultimately, there will also certainly be an effort to extend the holding of *Philadelphia Indemnity* to emails of individuals. One can expect more litigation on this issue in the future.

B. Photographs

New York evidence law has long permitted the admissibility of a photograph upon a showing that it is "relevant and properly identified and authenticated as a fair and accurate representation of what it purportedly depicts."[505] The admissibility of photographs is however, subject to the discretion of the trial court and the photograph, though relevant "may still be excluded by the trial court . . . if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury."[506] This discretionary exclusionary rule was applied by the Fourth Department in an instructive opinion in *People v. Horn*.[507]

The underlying criminal prosecution arose from the death, characterized as violent, of a drug dealer and white supremacist whose body was found concealed in the cupboard of an abandoned mansion.[508] In the ensuing police investigation defendant gave three inconsistent accounts of the victim's death.[509] He was subsequently charged with murder, criminal possession of a weapon and tampering with physical evidence.[510] At his trial, the People were permitted to

505. Guide to NY Evid rule 11.13, Photographs.

506. People v. Scarola, 71 N.Y.2d 769, 777, 525 N.E.2d 728, 732, 530 N.Y.S.3d 83, 86 (1988) (first citing People v. Alvino, 71 N.Y.2d 233, 242, 519 N.E.2d 808, 812, 525 N.Y.S.2d 7, 11 (1987); then citing People v. Acevedo, 40 N.Y.2d 701, 704, 358 N.E.2d 495, 497, 389 N.Y.S.2d 811, 813–14 (1976); and then citing Uss v. Oyster Bay, 37 N.Y.2d 639, 641, 339 N.E.2d 147, 149, 376 N.Y.S.2d 449, 451 (1975)).

507. 186 A.D.3d 1117, 1120, 129 N.Y.S.3d 604, 608 (4th Dep't 2020) (citing *Scarola*, 71 N.Y.2d at 777, 525 N.E.2d at 732, 530 N.Y.S.3d at 86).

508. *Id*. at 1118, 129 N.Y.S.3d at 606.

509. *Id*.

510. *Id*. at 1117, 129 N.Y.S.3d at 606.

play for the jury a scene from the film *The Boondock Saints*.[511] The scene took place inside a courtroom where the protagonists threatened everyone with pistols.[512] The scene, as further described by the Fourth Department, showed:

> Some people in the scene, presumably those playing the jurors, watch in astonishment while ducking for cover. The protagonists make loud, self-aggrandizing statements, declaring themselves vigilantes tasked by God with bringing justice to the world (*e.g.* "Each day we will spill their blood till it rains down from the sky!"). For those who do not behave morally, the protagonists offer a message: "One day you will look behind you and you will see we three . . . and we will send you to whichever God you wish." The protagonists put their guns to the back of the defendant's head while he is knelt on the floor in an execution-style pose. Gunfire erupts, and everyone runs out of the courthouse screaming.[513]

The proffered purpose for showing the scene was to rebut defendant's testimony that he was coerced by his accomplice into participating in the murder and then afterwards lying to the police.[514] That purpose was relevant, according to the People, because defendant had posted quotations from the scene on social media two days after the victim's murder and one day before defendant gave his statement to the police.[515]

The Fourth Department held that while the scene was relevant as argued by the People, error was present in admitting the evidence because the scene as shown to the jury was unfairly prejudicial to the defendant.[516] Its analysis employed in a thorough fashion the relevance/prejudice balancing rule. The court initially noted that prejudice to the defendant resulted not only from the possibility that the jury would perceive defendant's taste in movies to be an endorsement of violence from the violence depicted in the scene which was directed in part against a jury during a criminal trial, thereby likely affecting the jury's objectivity.[517]

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511. *Horn,* 186 A.D.3d at 1119, 129 N.Y.S.3d at 608.
512. *Id.* at 1120, 129 N.Y.S.3d at 608.
513. *Id.* at 1120, 129 N.Y.S.3d at 608.
514. *Id.*
515. *Id.*
516. *Horn,* 186 A.D.3d at 1120, 129 N.Y.S.3d at 608 (citing *People v. Scarola*, 71 N.Y.2d 769, 777, 525 N.E.2d 728, 732, 530 N.Y.S.2d 83, 86 (1988)).
517. *Id.* at 1120, 129 N.Y.S.3d at 608.

Moreover, in the court's view the scene degraded the criminal justice system, and the jury system in particular, as it implied that ". . . the reasonable doubt legal standard is responsible for freeing murderers and that justice can only be accomplished by vigilantes."[518] The court then focused on the issue of the probative value of the scene and upon doing so it found the scene had in fact ". . . little probative value."[519]

This finding was made in the context of its comment that the People could have made their relevance point merely by asking the defendant on cross-examination whether the quote he posted referenced a scene from a film in which vigilantes executed a criminal.[520] In essence, the court made the point, a very valid one, that the real purpose behind the showing of the scene was to create prejudice against the defendant. In conclusion, the court then had little difficulty in holding that the probative value of showing the scene was "substantially outweighed by the danger that its admission would prejudice defendant or mislead the jury."[521]

Lastly, it deserves comment that the Fourth Department found that the trial court abused its discretion in admitting the scene. Appellate findings of abuse of discretion in the making of discretionary evidence rulings are rare.[522] The court is clearly sending a message to trial judges, and attorneys as well, that the unfair prejudice standard is not one that is to be lightly employed.

C. Videorecordings

Does New York's best evidence rule, which requires the production of an original writing, recording, or photograph where its contents are in dispute and sought to be proven, and its various exceptions apply when the "writing" is a videorecording, such as video surveillance footage?[523] In *People v. Jackson*, the Fourth Department, in a well-reasoned opinion authored by Justice Tracey Bannister, citing Appellate Division, First Department and Appellate

518. *Id*.

519. *Id*.

520. *Id*. at 1120, 129 N.Y.S.3d at 608–09.

521. *Horn,* 186 A.D.3d at 1120, 129 N.Y.S.3d at 608–09. The court nonetheless found the error to be harmless and affirmed defendant's conviction. *Id.* at 1121, 129 N.Y.S.3d at 606.

522. *Id.* at 1119, 129 N.Y.S.3d at 608.

523. Guide to NY Evid rule 10.03, Best Evidence.

Division, Second Department decisions, answered in the affirmative.[524]

Defendant was charged with the theft of wireless speakers valued in excess of $3,000 from a Target store.[525] In a motion *in limine,* the People moved for permission to introduce testimony from the store's asset protection team leader (APT leader) regarding the contents of destroyed video surveillance footage that had depicted the incident.[526] In support of the motion, the proof was proffered that on the day on the day the APT leader became aware of the missing speakers, he viewed the video surveillance footage from the night before and, on that footage, he observed a male and a female working in concert to load the speakers into a shopping cart and observed the female (the defendant) pushing the cart past all points of sale and exiting the store with the male.[527] The APT leader then burned a limited amount of the footage onto a DVD, which included the footage that showed defendant and the male suspect leaving the store with a shopping cart containing merchandise.[528] By the time defendant was determined to be a suspect, the original surveillance footage, including the portion showing the speakers being loaded into the cart that was not preserved on DVD, had been destroyed consistent with the store's customary procedures.[529] Defendant opposed the motion, arguing the testimony was barred by the best evidence rule.[530] Supreme court granted the motion, and at trial the APT testified.[531]

The Fourth Department held the supreme court did not err in admitting the APT leader's testimony.[532] In so holding, the court had no difficulty in finding that the best evidence rule applied and that the rule would ordinarily require the production of the original video surveillance footage to prove its contents.[533] The issue then became whether the exception to the rule, which permits secondary evidence of the contents of an unproduced original, such as testimony, when the proponent of the secondary evidence sufficiently explains the unavailability of the original and has not procured its loss or

524. 192 A.D.3d 15, 18, 137 N.Y.S.3d 844, 847 (4th Dep't 2020).
525. *Id*. at 16, 137 N.Y.S.3d at 846.
526. *Id*.
527. *Id*.
528. *Id*.
529. *Jackson*, 192 A.D.3d at 16, 137 N.Y.S.3d at 846.
530. *Id*. at 16–17, 137 N.Y.S.3d at 846.
531. *Id*. at 17, 137 N.Y.S.3d at 846.
532. *Id*. at 18, 137 N.Y.S.3d at 847.
533. *Id*.

destruction in bad faith,[534] was applicable to video surveillance footage. The court saw no reason why the exception could not or should not be applied, relying on First and Second Department precedent.[535]

With the exception applicable, the issue then became whether the People met their heavy burden of establishing that they could in fact invoke it.[536] The court concluded it did in a compelling factual analysis.[537] It noted the absence of the surveillance footage was sufficiently explained in the People's pretrial motion papers, and a proper foundation with respect to its loss was laid at trial through the employee's testimony.[538] The store's customary practice was to delete footage after thirty days, or less time for certain cameras, and only a portion of the footage was preserved by the employee, thereby showing the destruction was not made in bad faith.[539] Further, the People laid a proper foundation establishing that the APT leader could sufficiently recount the contents of the unpreserved footage with reasonable accuracy by the substantial proof that his duties included regularly watching the store's surveillance footage and that he was familiar with the store and, in particular, its inventory of speakers; and his testimony describing the events shown on the unpreserved footage with specificity and detail, and with enough accuracy that he was able to recognize defendant from viewing the footage.[540]

In sum, *Jackson* is an instructive decision. While the better practice of a store when it has a videorecording of a crime being committed on its premises would be to preserve it while the police

534. *Jackson*, 192 A.D.3d at 17, 137 N.Y.S.3d at 846 (quoting Schozer v. William Penn Life Ins. Co., 84 N.Y.2d 639, 644, 644 N.E.2d 1353, 1355, 620 N.Y.S.2d 797, 799 (1994)).

535. *Id.* at 18, 137 N.Y.S.3d at 847 (first citing People v. Cyrus, 48 A.D.3d 150, 159, 848 N.Y.S.2d 67, 74 (1st Dep't 2007), then citing Lawton v. Palmer, 126 A.D.3d 945, 946, 7 N.Y.S.3d 177, 178 (2d Dep't 2015); and then citing People v. Wright, 160 A.D.3d 667, 669, 74 N.Y.S.3d 302, 305–06 (2d Dep't 2018) (noting that the complainant's testimony regarding the content of the lost surveillance tape did not violate the best evidence rule)).

536. *Id.* at 19, 137 N.Y.S.3d at 848.

537. *Id.* at 19, 137 N.Y.S.3d at 848; s*ee generally* Schozer v. William Penn Life Ins. Co., 84 N.Y.2d 639, 645–46, 644 N.E.2d 1353, 1356, 620 N.Y.S.2d 797, 800 (1994) (discussing how secondary evidence may be used to prove the contents of a lost original source if the proponent can prove that it is a reliable and accurate portrayal of the original source).

538. *Id.* at 18, 137 N.Y.S.3d at 847.

539. *Jackson*, 192 A.D.3d at 19, 137 N.Y.S.3d at 847–48.

540. *Id.* at 19, 137 N.Y.S.3d at 848.

investigation is still ongoing, the fact is loss or destruction of the videorecording is inevitable, and when that happens *Jackson* shows how to deal with it when the incident becomes the subject of a criminal prosecution.

D. Social Media

In *People v. Goldman*,[541] the Court of Appeals revisited its seminal social media decision addressing the required authentication foundation for the admissibility of social media evidence, *People v. Price*, decided three years earlier.[542] In *Price*, which involved the admissibility of a still photograph on an Internet profile page, the Court noted that with respect to social media evidence "'[t]he foundation necessary to establish [authenticity] may differ according to the nature of the evidence sought to be admitted.'"[543] *Goldman* involved the admissibility of a YouTube video.[544]

Goldman involved a homicide prosecution arising from an incident in which defendant was alleged to have shot and killed an individual in the territory of a rival gang.[545] At trial, a redacted version of a YouTube music video entitled "Mobbin' Out" was admitted into evidence.[546] The video depicted defendant rapping about "run[ning] up" into a rival crew's "house" and was admitted as probative of defendant's motive related to territorial gang activity.[547] The trial court admitted the video.[548] Upon appeal of his conviction to the Appellate Division, First Department, the court reversed and remanded for a new trial. Among the grounds cited for reversal was that the video was not properly authenticated under any of the methods cited in *Price*.[549]

The issue before the Court of Appeals on the People's appeal from the First Department reversal was whether the video was sufficiently authenticated to demonstrate that the video accurately

541. 35 N.Y.3d 582, 595, 159 N.E.3d 772, 781, 135 N.Y.S.3d 48, 57 (2020) (citing People v. Price, 29 N.Y.3d 472, 477, 80 N.E.3d 1005, 1009, 58 N.Y.S.3d 259, 265 (2017)).

542. 29 N.Y.3d 472, 473–74, 80 N.E.3d 1005, 1007, 58 N.Y.S.3d 259, 261 (2017).

543. *Id.* at 476, 80 N.E.3d at 1009, 58 N.Y.S.3d at 263 (quoting People v. McGee, 49 N.Y.2d 48, 59, 399 N.E.2d 1177, 1183, 424 N.Y.S.2d 157, 163 (1979)).

544. *Goldman*, 35 N.Y.3d at 588, 159 N.E.3d at 776, 135 N.Y.S.3d at 52.

545. *Id.* at 585, 159 N.E.3d at 774, 135 N.Y.S.3d at 50.

546. *Id.* at 588, 159 N.E.3d at 776, 135 N.Y.S.3d at 52.

547. *Id.*

548. *Id.*

549. *Goldman*, 35 N.Y.3d at 594, 159 N.E.3d at 781, 135 N.Y.S.3d at 57.

represented the subject matter depicted.[550] The court held it was in a 5-2 decision, with Chief Judge Janet DiFiore writing the majority opinion, Judge Eugene Fahey concurring in result (finding error but viewing it as harmless) in an opinion, and Judge Jenny Rivera dissenting in a separate opinion in which Judge Rowan Wilson joined.[551]

Chief Judge DiFiore catalogued the facts that supported the majority's conclusion that the video was sufficiently authenticated.[552] She noted that defendant did not dispute that he was the individual who appeared in the video reciting certain words, a matter she viewed as "significant."[553] She also noted the video contained distinctive identifying characteristics as it depicted defendant and two of the other individuals who, as indicated by surveillance footage from the night of the shooting, were in the vehicle used during the shooting and in similar attire to what they were wearing that night; and the video's background demonstrated that it was filmed in defendant's neighborhood.[554] Furthermore, the video was uploaded close in time to the homicide, and the driver of the vehicle testified that defendant called him the morning after the shooting to declare that the victim was dead and to invite him to attend the filming of a video later that day, establishing the timing of the making of the video.[555] Lastly, it was noted that the driver, although he did not attend the filming, stated his belief that the name of the video was "Mobbing Out," affirmed that the admitted video accurately represented what he had previously viewed on YouTube, identified defendant and the two passengers from the video, and confirmed that a social media handle that appeared as text on the video was associated with defendant's nickname and his group's name.[556]

Chief Judge DiFiore also at length distinguished *Price*. She observed that that in *Price*, the People sought to introduce a still photograph they found on an Internet profile page, which showed

550. *Id.* at 594–95, 159 N.E.3d at 781, 135 N.Y.S.3d at 57 (citing People v. Price, 29 N.Y.3d 472, 477, 80 N.E.3d 1005, 1009, 58 N.Y.S.3d 259, 265 (2017)).

551. *Id.* at 596, 597, 159 N.E.3d at 774, 782, 135 N.Y.S.3d at 50, 58.

552. *Id.* at 595, 159 N.E.3d at 781–82, 135 N.Y.S.3d at 57–58.

553. *Id.* at 595, 159 N.E.3d at 781, 135 N.Y.S.3d at 57.

554. *Goldman*, 35 N.Y.3d at 595, 159 N.E.3d at 781, 135 N.Y.S.3d at 57.

555. *Id.* at 588, 595, 159 N.E.3d at 776, 781–82, 135 N.Y.S.3d at 52, 57–58 (citing *People v. James*, 93 N.Y.2d 620, 630, 717 N.E.2d 1052, 1056–57, 695 N.Y.S.2d 715, 719–20 (1999).

556. *Goldman,* 35 N.Y.3d at 588, 595, 159 N.E.3d at 776, 781–82, 135 N.Y.S.3d at 52, 57–58.

defendant holding a gun, for the purpose of proving that it was the same gun defendant used in the charged robbery.[557] While the court held the photo should not have been admitted due to the absence of a proper foundation, that conclusion was based on the People failing to meet their own proposed burden of proof, namely, the witness was not able to identify the gun as the one used in the robbery and there was insufficient proof to demonstrate that defendant controlled the webpage on which the photo was posted.[558] Here, the proof of authentication was much more substantial, which made *Price* readily distinguishable.[559]

Chief Judge DiFiore made clear that the court was not adopting a standard for authentication of social media generally, just addressing the People's argument.[560] Instead, she emphasized that the necessary foundation would turn upon the nature of the evidence sought to be admitted.[561] While some might prefer a "one size fits all" approach to authentication, the court's approach as articulated is appropriate due to the numerous ways social media evidence is made and presented.

557. *Id.* at 594, 159 N.E.3d at 781, 135 N.Y.S.3d at 57.

558. *Id.* (citing *Price*, 29 N.Y.3d at 480, 80 N.E.3d at 1011, 58 N.Y.S.3d at 265).

559. *See Goldman*, 35 N.Y.3d at 595, 159 N.E.3d at 781, 135 N.Y.S.3d at 57 (citing *Price*, 29 N.Y.3d at 477, 80 N.E.3d at 1009, 58 N.Y.S.3d at 265).

560. *See id.* at 616, 159 N.E.3d at 796, 135 N.Y.S.3d at 72 (citing People v. Julian, 41 N.Y.2d 340, 343, 360 N.E.2d 1310, 1312, 392 N.Y.2d 610, 612 (1977)).

561. *Id.* at 595, 159 N.E.3d at 781, 135 N.Y.S.3d at 57.